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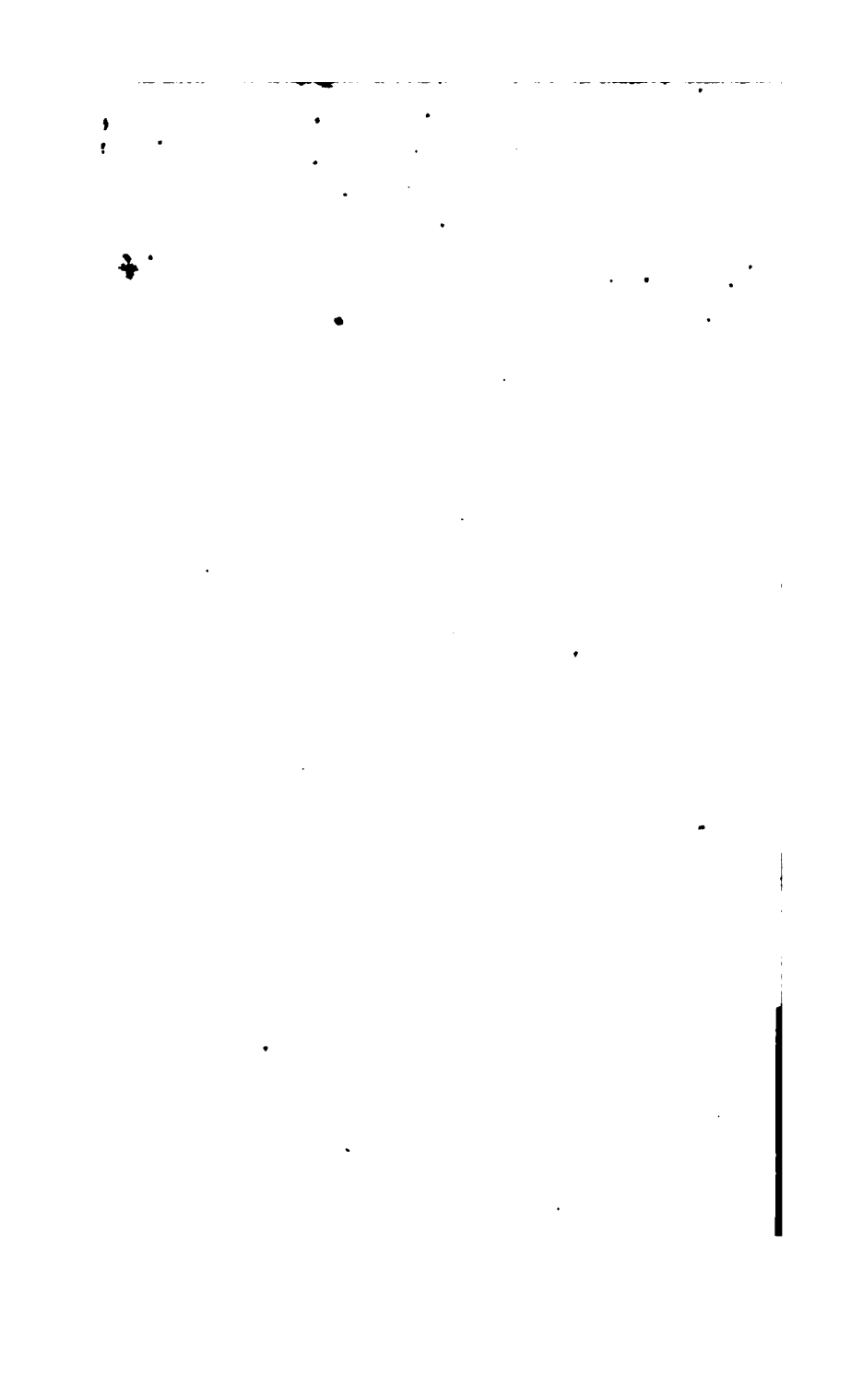
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THE  
LAW OF FIXTURES,

WITH REFERENCE TO  
REAL PROPERTY,  
AND  
CHATELS OF A PERSONAL NATURE.

TO WHICH IS ALSO ADDED,  
*The Law of Dilapidations,*  
ECCLESIASTICAL AND LAY.

BY  
STANDISH GROVE GRADY, ESQ.  
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON:  
OWEN RICHARDS,  
LAW BOOKSELLER AND PUBLISHER,  
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## PREFACE.

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A PRACTICAL work on Fixtures, adapted to the present state of the law, having for a long time been demanded by the Profession, and the Author himself having some time since experienced not a little inconvenience from the want of such a work, he resolved on compiling the present volume, and now presents it to the reader in the hope that it may be found to be both convenient and easy of reference, and to possess the advantage of comprising all the cases that are to be met with in the books on the subject, down to the present time.

The Law of Fixtures being a subject upon which all those persons who are possessed of real property require and are daily seeking information, some little pains have been taken with the arrangement of the work, in order to make it intelligible to non-professional men, for whose direction and guidance it is hoped it will be found equally useful. All legal technicalities have therefore been carefully avoided, and the conclusions drawn

from the cases have been stated with such clearness, as was necessary to make the work intelligible to a class of persons who have not received a legal education. The work is divided into different chapters, which are respectively devoted to the different classes of persons between whom questions, with respect to the right to remove fixtures, generally arise, viz. heir and executor, tenant for life or in tail and remainder-man or reversioner, and landlord and tenant.

These different chapters are again subdivided with reference to the exceptions that have been engrafted upon the general rule with regard to fixtures, which have been erected for the purposes of trade, of agriculture, of ornament, or domestic use; and, as the nature of the subject required and suggested, this portion of the work comprises those cases only where there is not any express contract between the parties. The subject is then considered with reference to those cases where an express contract exists on the sale or transfer of fixtures between landlord and tenant, vendor and vendee, mortgagor and mortgagee, heir and devisee, bankrupt and assignee; and then follows the rights, exemptions, and liabilities conferred and created in respect of

fixtures; and the inquiry is concluded by a chapter on the remedies which the law affords with reference thereto.

It has been deemed advisable, as in some measure connected with fixtures, to introduce the Law of Dilapidations. This subject is treated of under two distinct heads, "Ecclesiastical" and "Lay," which are again subdivided in such manner as was considered requisite to elucidate the law. The first branch includes all the cases to be found in the books upon ecclesiastical subjects, and the second comprises those cases which have arisen between landlord and tenant with reference to the obligation to keep the premises in repair, to whom, as well as ecclesiastical persons, it is hoped it will be found of utility, and convenient of reference.



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## ERRATA.

Page 16. line 3. read "Liford's."

87. line 4 from bottom, read "4 B. & C."

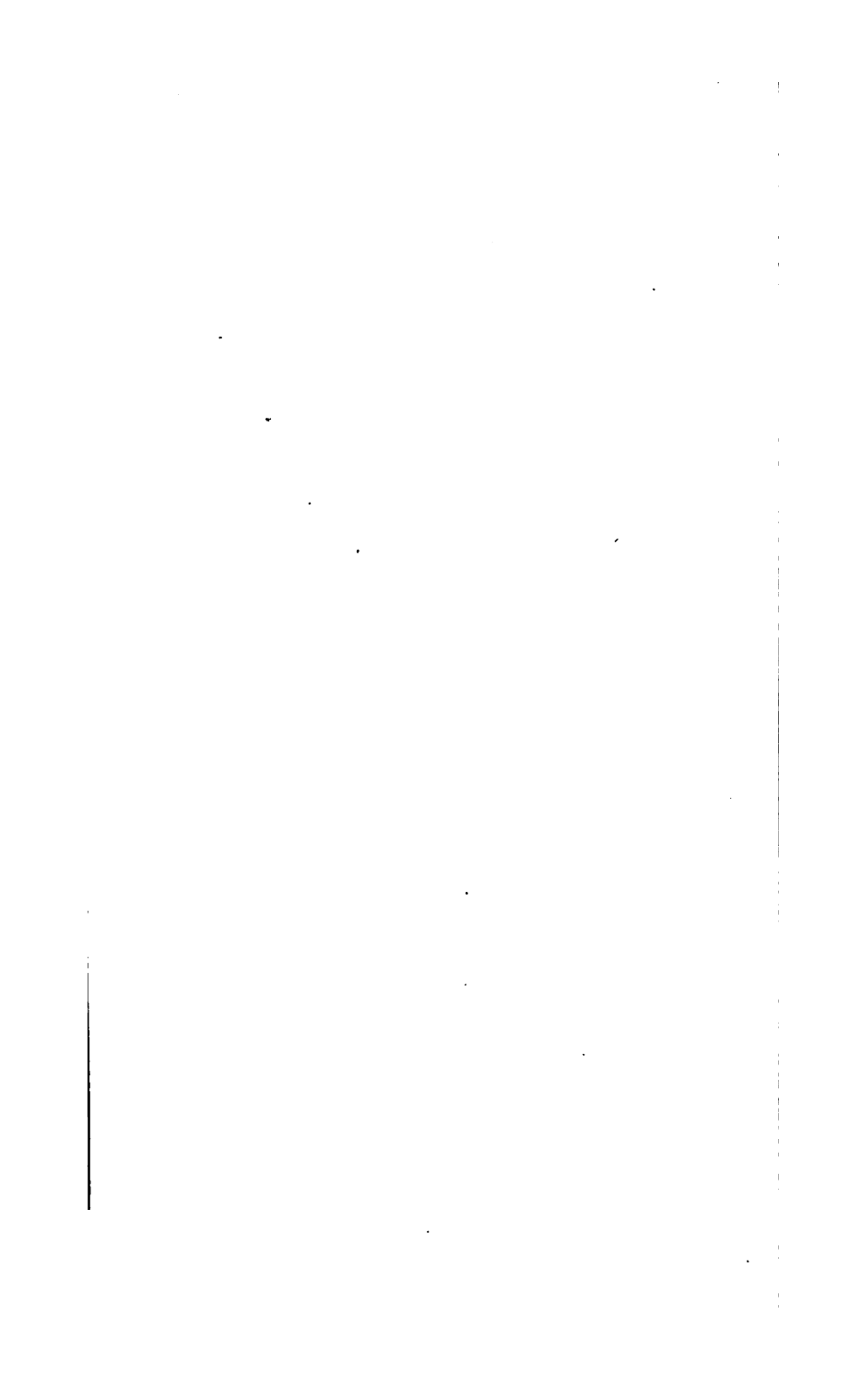
94. line 9 from top, read "Colgrave" for "Coleman."

116. Sec. III. read the six first lines of the first paragraph thus: "*Contracts not within the Statute.*— Contracts for the sale of fixtures are not within the Statute of Frauds, and need not be in writing, nor signed by the parties nor their authorised agents; and therefore, where a short time, &c."

270. line 8 from top, read "Weston" for "Warton."

279. Sec. VII. read "To what buildings, &c."





THE  
LAW OF FIXTURES.

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BOOK I.

CHAPTER I.

OF FIXTURES IN GENERAL.

*Definition.—Exception to General Rule.—What sufficient Annexation, what not sufficient Annexation.—When resting on Brickwork.—Tenant may make Erections removable.—Exceptions to General Rule.—Trade.—Agriculture.—Ornament, Convenience, Domestic Use.—Custom, Nature of Fixture, Intention.—Injury.—Advantage to Estate.*

**DEFINITION.**—Fixture is a word of ambiguous signification: it is however used to denote chattels of a personal nature which have been affixed to land.

In this work “fixtures” is considered with reference to such inanimate things of a personal nature as have become affixed or annexed to the

realty, but which may be severed, disunited, or removed by the party, or his personal representative, who has so affixed them without the consent of the owner of the freehold.\* Per *Parke B.*, 1 C. M. & R. 276.

*Exception to General Rule.*—This definition is to be considered as an exception to the general rule, *quicquid plantatur solo, solo cedit*. Whatever is affixed to the realty is thereby made parcel of it, and partakes of all its incidents and properties. See *Hardwick C.* in *Dudley v. Ward*, Amb. 113.; Lord *Ellenborough* in *Elwes v. Maw*, 3 East, 57.; *Park B.* in *Hallem v. Runder*, 1 C. M. & R., 275.; *Minshall v. Lloyd*, 2 M. & W. 459.; *Lee v. Ridsen*, 7 Taunt. 191.

*What sufficient Annexation.*—The question naturally arises, What particular species of annexation will confer upon goods the character of fixtures within the above definition? The merely *laying* and *resting* upon the earth without *letting* and *imbedding* them into it, goods, or even buildings, of whatsoever description, will not confer upon them the right to become fixtures. The article must be *fixed in or to the ground*, or some

\* See the case of *Sheen v. Richie*, 5 M. & W. 175., where the declaration was in trover for goods, chattels, and fixtures (enumerating, amongst other moveable articles, stoves, shelves, &c.), and it was held, after verdict (general damages having been assessed on the whole declaration), that the word "fixtures" would not necessarily be taken to mean things affixed to the freehold; and therefore the judgment ought not to be arrested.

substance already become a portion of the freehold, in order to deprive it of its personal nature. Thus, in the case of *Elwes v. Maw*, 3 East, 38., where a tenant in agriculture, who erected at his own expense, and for the mere necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar and tiled, *and let into the ground*, it was held that he could not remove them, even during his term, and although he left the premises in the same state as when he entered. So also in *Horne, Exr. v. Baker*, Ass., 9 East, 215., which involved the question as to the right of assignees of a bankrupt to goods and chattels which were in his order and disposition under the 21 Jac. 1. c. 19. ss. 10, 11. The property in question consisted of certain stills, which were set in brick-work *and let into the ground*; also some vats or worm-tubs which were supported by and rested upon brick-work and timber, but were not fixed in the ground; and also some other vats which stood on horses or frames made of wood, which were not let into the ground, but stood upon the floor; and the Court held that those vats which were fixed to the freehold did not pass to the assignees under the words *goods and chattels* in the statute.

So, where the tenant had erected a viranda, the

lower part of which was attached to posts fixed in the ground, *Abbott J.* held that the tenant could not remove it. *Penry, Admix. v. Brown*, 2 Stark. N. P. C. 403.\*

The foregoing cases show distinctly what will be considered a sufficient annexation to the soil, to prevent the removal therefrom of a chattel which has been affixed thereto.

*What is not a sufficient Annexation.* — But should this complete annexation to the freehold not take place, the articles are not within the class of cases already cited, and are not what are usually called fixtures; they remain mere personal chattels, and may be removed by the party who brought them upon the premises. Thus, in the case of *Culling v. Tuffnall*, Buller's N. P. 34., where it was held that the tenant who had erected a barn upon the premises, and put it upon *pattens and blocks of timber lying upon the ground, but not fixed in or to the ground*, might, by the custom of the country, take them away at the end of his term; but as Lord *Ellenborough* in *Elwes v. Maw*, 3 East, 38., said, "To be sure he might, for the terms of the statement exclude them from being considered as fixtures, they were not fixed in or to the ground." See also *Nayler v. Collinge*, 1 Taunt. 21. So in

\* In this case the tenant covenanted to repair, and keep in repair, the premises and all erections, buildings, and improvements which might be erected thereon during the term, and yield up the same in good and sufficient repair.

*Horn v. Baker*, *antè*, p. 3.\*, those vats, &c. which were not fixed to the freehold were held to pass to the assignees, as being in the order and disposition of the bankrupt. So in *Davis et al. v. Jones et al.*, 2 B. & Al. 165., certain parts of a machine which had been put up by the tenant during his term, and which were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between outgoing and incoming tenant, were held to be the goods and chattels of the outgoing tenant, for which he might maintain trover, the court of King's Bench was of opinion, that, at least between landlord and tenant, the question depended on a conclusion of facts to be drawn from the matters stated in the case, and not upon any point of law; and therefore, that the jibs (which were certain uprights that were placed in certain caps or steps of timber fixed into a building, and which turned round the work in these caps or steps), from their mode of construction, were not properly fixtures at all, but mere personal chattels.

*Where resting on Brick Foundation.*—It should seem also, that if goods or buildings are merely *placed* and rest *upon*, without being let into, a

\* In confirmation of this decision, see *Clark v. Crownshaw*, 3 B. & Ad. 804.; *Coombs v. Beaumont*, 5 B. & Ad. 72.; *Boydell v. Mitchell*, 1 C. M. & R. 177.; 3 Tyrwh. 974.; *Rufford v. Bishop*, 5 Russ. 346.; *Hubbard v. Bagshaw*, 4 Sim. 326.

brick or other foundation, and can be taken away without injury to such foundation, they may legally be removed, although the *foundation* itself be in a solid manner rendered part of the freehold and cannot be severed therefrom, and were constructed for the express purpose of supporting the superincumbent weight, *Rex v. Otley* (Inhabs.), 1 B. & Ad. 161., in which case it was held, that a wooden windmill placed upon, but not let into, a brick foundation, was removable by a tenant. So in the case of *Wansbrough v. Maton*, 4 Ad. & E. 884., 6 N. & M. 367.\*, where a wooden barn had been erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by weight alone. So where a tenant had built upon part of the land a post windmill, constructed upon cross traces laid upon brick pillars, but not attached or affixed thereto, it was held, that this windmill was a mere chattel, and not to be considered as connected with the land. *Rex v. Londonthorpe*, 6 T. R. 377.

It follows from the foregoing cases, therefore, that wherever a chattel is perfectly connected with the freehold, either by being let into the earth itself, or by being cemented or otherwise united to some erection previously attached to the ground, it becomes part of the freehold itself, and

\* Trover lies for the conversion of such an erection, though it does not lie for fixtures, *id.* ; and see *Mackintosh v. Trotter*, 3 M. & W. 184.

cannot be removed by the tenant or his representative.

*Tenant may make Erections removable.*—And that a tenant may so construct any erection he may make, as to avoid the application of the above rule: thus, he may erect barns, granaries, sheds, and mills upon blocks, rollers, pattens, pillars, or plates resting on brickwork, so as to reserve to himself the right of removal. *Vide post, passim.*

*Exceptions to General Rule.*—To the general rule, *quicquid plantatur solo, solo cedit*, many exceptions have been made. The question therefore suggests itself, what particular rules or exceptions regulate the right of removal between persons standing in different relative situations towards each other, in respect to the premises to which the goods have been united? It has been stated, that whenever any thing is affixed to the freehold, neither the party annexing it, nor his personal representative, can ever again sever it, without the consent of the reversioner; the property, by being annexed to the land, immediately belongs to the freeholder, and the tenant, by making it a part of the freehold, is considered to abandon all future right to it, so that it would be waste in him to remove it afterwards; it therefore falls in with the term, and comes to the reversioner as part of the land. *Herlakenden's case*, 4 Rep. 64., Co. Litt. 53.; *Cooke v. Hum-*



phrey, Moore, 177.; Darby (Lord) v. Asquith, Hob. 234.

On this general rule, certain exceptions have been engrafted with reference to the *purpose* and *object* for which the article has been annexed to the land.

1st. In favour of *trade*, of *agriculture*, of *ornament* and *convenience*, or of *general improvement* of the estate. It is upon these grounds generally, that the courts have upheld the doctrine of property in fixtures; but they are not the only considerations on which the question has turned.

*Custom.*—For we find that *custom*, as in Culling v. Tuffnall, Bull. N. P. 34.; Davis v. Jones, 2 B. & Ald. 165.; and see Wetherell v. Howells, 1 Campb. 227.; Trapps v. Harter, 3 Tyrwh. 603.; Went. Off. Exrs. 61.

*Nature of Fixture.*—The nature of the article affixed: see Lord Hardwick in Lawton v. Lawton, 3 Atk. 14.; and see Thresher v. East London Water-Works Company, 2 B. & C. 608.

*Intention.*—The intention of the party in attaching to the freehold, as in Lawton v. Lawton, *supra*; Salmon v. Lawton, 1 H. Bl. 260.; see Buckland v. Butterfield, 2 B. & B. 56.

*Injury.*—Injury to the freehold in case of removal: 21 H. 7. 26.; Cooke v. Humphrey, *supra*; Lawton v. Lawton, *supra*; Dudley v. Warde, 1 Amb. 113.; Davis v. Jones, *supra*; Every v. Cheslyn, 3 Ad. & E. 75.

*Advantage to Estate.*—The advantages derivable to the estate: *Lawton v. Lawton*, *antè*; *Dudley v. Warde*, *antè*; *Lawton v. Salmon*, *antè*, — have been respectively relied on.

Few decisions, therefore, can be considered absolute authorities in other instances, even of fixtures of a similar denomination. Every case of this sort must depend upon its own special and peculiar circumstances. Per *Dallas C. J.*, *Buckland v. Butterfield*, 1 B. & B. 58.

## CHAPTER II.

SECT. I. *Of the Right to Fixtures as between Executor and Heir of Tenant in Fee.*

SECT. II. *Of the Right of Executor of Tenant in Fee in respect of Fixtures for Purposes of Trade, or in relation to Trade, in part.*

SECT. III. *Of the Right of Executor of Tenant in Fee in respect of Fixtures for the Purposes of Ornament and Convenience, or Domestic Use ; and of Agriculture.*

## SECTION I.

*Of the Right to Fixtures as between Executor and Heir of Tenant in Fee.*

*Between whom Questions arise.—Heir and Executor.—Tenant for Life or in Tail and Remainder or Reversioner.—Landlord and Tenant.—Exceptions confined to Trades.—Agriculture.—Ornament.—Ancient Rule.—What goes to Heir.—Pales, Posts, and Rails.—Furnace, Doors, Locks, Glass Windows.—Tables, Dormants, &c.—Vats in Brew-house or Dyehouse.—Millstones.—Pictures and Looking-glasses.—Dairy.—Constructive Annexations.—Millstone.—Keys, Locks, &c.—Sails of a Windmill.—Windows.*

*Between whom Questions arise. — “ QUESTIONS respecting the right to what are ordinarily called*

fixtures principally arise between three classes of persons."

1st. *Heir and Executor*.—"Between different descriptions of representatives of the same owner of the inheritance, viz. between his *heir* and *executor*. In this first case, *i. e.* as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, any thing which has been affixed thereto."

2dly. *Tenant for Life or in Tail, and Remainderman or Reversioner*.—"Between the executors of *tenant for life or in tail* and the *remainderman or reversioner*, in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor."

3dly. *Landlord and Tenant*.—"That in which the greatest latitude and indulgence have always been allowed in favour of the claim to having any particular articles considered as personal chattels, as against the claim in respect of freehold or inheritance, is the case between landlord and tenant." See Lord *Ellenborough*, in *Elwes v. Maw*, 3 East, 51.; *Lawton v. Salmon*, 1 H. BL. 260. *in notis*. And see Lord *Kenyon*, in *Penton v. Robart*, 2 East, 90, 91.

*Exceptions confined to Trade, &c.*—It would seem that, although other circumstances have been

relied on, to extend the exceptions in favour of the right of the party who has set up fixtures, or his representatives, to remove them, yet there is a strong feeling evinced not to relax the old rule of law beyond the three classes of cases referred to in the preceding Chapter, viz. for the purposes of trade, of agriculture, of ornament and convenience, at least as regards the heir and executor, and tenant for life or in tail, and remainder-man or reversioner.

It is proposed to consider the subject under these divisions, and with reference to the three classes of persons, in the order in which they are above set forth, being that in which they are enumerated by the Chief Justice Lord *Ellenborough*, in his elaborate and important judgment in *Elwes v. Maw*, *post*, p. 63. This will be found to be the most convenient course, because, as greater latitude and indulgence have always been allowed in questions arising between landlord and tenant than in those between heir and executor, or tenant for life or in tail and remainder-man or reversioner, so the decisions by which the privilege of removing fixtures is established between the two latter descriptions of persons may, *à fortiori*, be considered as authorities in cases between landlord and tenant, although the converse be not true.

The question which it is proposed first to discuss is, If a tenant in fee annex a personal chattel to the soil, does the right of property in such

chattel, after his decease, vest in his personal representative, or in the heir who takes the inheritance in the land? Secondly,—the exceptions engrafted on the general rule in favour of fixtures set up for trade, and those set up for ornament and convenience or domestic use.

*The ancient Rule.*—It will be seen upon a review of the ancient authorities on this subject, that the principle to be collected from them is, that the executor of the owner in fee was not entitled as against the heir of the inheritance in the land to remove anything connected with the freehold; the rule being, *quicquid plantatur solo, solo cedit*.

*What goes to Heir.*—And accordingly it is laid down, that goods and chattels annexed to the freehold go to the heir, and not to the executor or administrator. Com. Dig., tit. Biens (B.), 21 H. 7. 26., 4 Co. 63. b, unless they can be removed or severed without prejudice to the inheritance. Rol. Abr. 818.; Went. Off. Exr. 62. 86.; Bac. Abr. tit. Exors. &c. (H.) 7 ed.

*Pales, Posts, Rails.*—And therefore it has been held that pales, posts, and rails for an enclosure go to the heir. 12 H. 7. 26 b.; Com. Dig. *suprà*.

*Furnace.*—So if a furnace be erected in the middle of the floor, although it does not depend on any wall. 21 H. 7. 26, 27.; Keilw. 88.; 22 H. 7. See 20 H. 7. 13. 24.; 21 H. 7. 27.; Day v. Austin,

Owen, 70, 71.; Went. Off. Exr. 61.; Wood v. Smith, Cro. Jac. 129.

*Doors, Locks, Glass, &c.*—The doors and locks of a house, and glass in a window, go to the heir: Com. Dig. Biens (B.); albeit the executor have a lease of the house, and by that means have the house also.

But if the glass be from the windows, or there be wainscot loose, or, doors more than are used that are not hanging, or the like, these things shall go to the executor or administrator. Shep. Touch. 469, 470.

*Tables, Dormants, &c.*—So the heir shall have tables, dormants, leads, mangers, millstones, anvils, door-keys, glass windows, &c. Godolp. pt. 2. c. 14. s. 1. So furnaces, vats in a brewhouse or dye-house, if fixed to the freehold; but it is said that vats and furnaces fixed in a brewhouse or dye-house by the lessee, shall go to the executor or administrator, but if fixed by the tenant in fee, the heir shall have them. Noy's Max. 50.; Shep. Touch. 470.; Went. Off. Ex. 149—151.

So millstones fixed to a mill, go to the heir. Com. Dig. tit. Biens (B.).

*Coppers, Leads, &c.*—The same law of coppers, leads, vats for dyers and brewers, salt pans set up in wych-houses, benches, wainscots; for these, being fixed to the freehold, are not chattels, but parcel of the freehold. Went. Off. Exr. 62.; 4 Co. 63, 64.; 3 Atk. 16.; Bac. Abr. tit. Exrs., &c. (H.) 7th ed.; but see Poole's case, 1 Salk. 368.

*Pictures and Looking-Glasses.* — And pictures and looking-glasses, though they are personal estate, yet, if put up instead of wainscot, or where otherwise wainscot would have been put up, they shall go to the heir; for the house ought not to come to the heir maimed and disfigured. *Cave v. Cave*, 2 Vern. 508.; Com. Dig. tit. Biens (B.) But see *Lawton v. Lawton*, 3 Atk. 14.; *Dudley v. Ward*, Ambl. 113.; *Harvey v. Harvey*, 2 Salk. 1141.

If dung lie scattered upon the ground, so that it cannot be gathered without taking part of the soil with it, then it is parcel of the freehold; but if in a mass, it goes to the executor. *Carver v. Price*, Sty. 66.; *Noy's Max.* 119. See *Higgin v. Mortimer*, 5 C. & P. 616. A reference was made to the Master to inquire whether timber, &c. laid down for making waggon ways, &c., for the better working of mines, &c., are fixed to the freehold and go to the heir or remainder-man, or to the personal representative of the party erecting them. *Lowther v. Cavendish*, 1 Eden, 99.

*Constructive Annexation.* — But there is another species of annexation which does not come within those already adverted to, and which is called a constructive annexation of chattels. They are not actually affixed to the freehold, but shall nevertheless go to the heir, and not to the executor. Thus, where the stone is taken from a mill to pick it, in order to make it grind the better, it was



held, that although the stone was severed from the mill, yet it remains parcel of the mill, and will go to the heir. See *Lilford's case*, 11 Co. 56. So likewise, keys, locks, doors, anvils, &c. *Godol. pt. 2. c. 14. s. 1.*; *Went. Off. Exr. 62.*; *Herlakenden's case*, 4 Co. 63.; 3 Atk. 16.; *Bac. Abr. tit. Exrs., &c. (H.) 7 ed.*; *Place v. Fagg*, 4 M. & Ry. 277. So the sails of a windmill are parcel of the freehold, and shall go to the heir. Per *Clench and Fenner*, justices, in *Rex v. Cross*, 1 Sid. 207. Windows, whether of glass or otherwise. *Bac. Abr. tit. Exrs. &c. (H.) 7th ed.*

## SECTION II.

*Of the Right of Executor of Tenant in Fee in respect of Fixtures for Purposes of Trade, or in relation to Trade, in part.*

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*Rules and Exceptions regulating the Right of Removal.—Where Matter of a personal Nature.—Mixed Case between enjoying the Profits of the Land and carrying on a Species of Trade.—Cider Mill.—Fire Engine, Salt Pans.—Calico-printing Machinery.—Decisions reconsidered.—Custom Criminal Case.*

SUCH, then, being the rigour of the old law in favour of the inheritance and against the personal estate, it remains, secondly, to be ascertained what relaxation it has obtained in later years.

*Rules and Exceptions regulating the Right of Removal.*—The subject of inquiry will therefore be, as to what particular rules and exceptions regulate the right of removal of things personal affixed to the freehold, as between parties standing in the relative position of heir of tenant in fee, and executor or administrator; or in other words, under what circumstances the executor or administrator of the party who affixed personal chattels to the freehold, is entitled to remove them and reduce them again to their original character, so as to form part of the estate of the personal representative.

The first exception to be met with in the books, is in favour of trade; and as it is exceedingly difficult to draw any accurate and fixed principle from a class of cases, each of which is decided upon its own peculiar facts, or with reference to some point which would make it very unsafe to rely upon the particular decision as an authority in other instances, even of fixtures of a similar denomination; it is considered that the best plan to be adopted, in order to give the most correct view of the law as it at present stands, is to go regularly through the authorities, observing upon each case where comment is necessary.

*Where Matter of a personal Nature.* — The earliest cases seem to establish the principle, that when the fixture is an accessory to a matter of a *personal* nature, it should be considered itself as personalty, and is removable as between the heir and executor. *Lawton v. Lawton*; *Lawton v. Salmon*; *Elwes v. Maw*, per *Lord Ellenborough*, *antè*. So the executor will be entitled where there is a mixed case between enjoying the profits of the land, and carrying on a species of trade. Thus in an action of trover for a cider mill by the executor against the heir, tried before *Comyns*, C. B., at Worcester assizes; although it would seem that the mill was deep in the ground and fixed to the freehold, yet his lordship held it to be personal estate, and directed the jury to find for the executor. This case does not seem to be any

where reported; it was cited by Mr. Wilbraham, arguendo the case of *Lawton v. Lawton*, 3 Atk. 14., and was there recognised by Lord *Hardwicke*, and subsequently by the same learned judge in *Dudley v. Warde*, Ambl. 114., and also by Lord *Ellenborough* in *Elwes v. Maw*, and by Lord *Kenyon* in *Dean v. Allalley*, 3 Esp. N. P. 11.

*Fire Engine.* — In *Lawton v. Lawton*, 3 Atk. 13., the question was raised, whether a fire-engine set up for the benefit of a colliery by a tenant for life shall be considered as personal estate, and go to his executor, or fixed to the freehold, and go to a remainderman; and Lord *Hardwicke* says, “One reason that weighs with me is its being a mixed case between enjoying the profits of the land and carrying on a *species of trade*; and considering it in this light, it comes very near the instances in brewhouses, &c. of furnaces, coppers, &c.” And Lord *Ellenborough*, in *Elwes v. Maw*, reconciling the two cases, says, “upon the same principle, Lord C. B. *Comyns* may be considered as having decided the case of the cider mill, &c., as a mixed case between enjoying the *profits of the land* and carrying on a *species of trade*, and as considering the cider-mill as properly an accessory to the trade of making cider.” See Buller’s N. P. 34.; Lord *Kenyon*, in *Dean v. Allalley*, 3 Esp. N. P. 11.

Mr. *Williams* remarks, in his valuable work on executors and administrators, p. 576., 3d ed., that this (the cider mill) is the only expressly decided

case in favour of the right of executor of tenant in fee to trade fixtures.

See Lord *Hardwicke*, in *Lawton v. Lawton*, Atk. 15., where his Lordship says that he thinks that between ancestor and heir it would be very hard that such things should go in every instance to the heir.

But where fixtures are the only means of enjoying the benefit of the inheritance, and are accessaries necessary to the enjoyment of the principal, they belong to the heir.

The case of *Lawton, executor v. Salmon*, 1 H. Bl. 260., *in notis*, before Lord *Mansfield*; which was a case of *saltpans*, and came on in the shape of an action of trover, brought for the salt-pans by the executors against the tenant of the heir-at-law. These salt-pans were made of hammered iron, rivetted together, and were placed in the works by the testator in his lifetime; they were brought in pieces, and might be so removed; they were fixed by mortar to a brick floor, and had furnaces under them, and might be removed without injuring the building, but the salt works would be no use without them. And the question was, Whether the heir-at-law was entitled to them; and Lord *Mansfield*, in delivering judgment, said, "But I cannot find that there is any relaxation of this sort (speaking of the rule as between landlord and tenant, and tenant for life and remainderman, except in the case of the cider mill,

which is not printed at large. The present case is very strong. The salt spring is a valuable inheritance, but no profit arises from it unless there is a salt work, which consists of building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them; they are accessaries necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance: he could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials, or a contribution from the heir in lieu of them. But the heir gains 8*l.* per week by them. On the reason of the thing, therefore, and the intention of the testator, they must go to the heir. It would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt works; he might very well have said, 'I leave the estate no worse than I found it.' That, as I stated before, would be for the encouragement and convenience of trade, and the benefit of the estate. For these reasons we are all of opinion that the saltpans must go to the heir."

Lord *Ellenborough*, in *Elwes v. Maw*, 3 East, 54., distinguishes this case from the two former, on the ground that Lord *Mansfield* does not seem to have considered the saltpans as accessory to the

carrying on a trade, but as merely the means of enjoying the benefit of the inheritance.

There is another case which bears somewhat on this question, which may as well be noticed here. The short facts of the case were these. The bankrupts carried on the business of calico-printers in co-partnership in the county of Lancaster. The lands and buildings had many years before the bankruptcy been purchased by and conveyed to one of the partners, but the estate was as the partnership. The machinery was erected by the partners to carry on their trade, and consisted of articles which could be removed without injury to the freehold, and were fixed by bolts and screws. The machinery was all removed without injury to it, or the freehold. In this part of the country this kind of machinery was always brought and set distinct from the freehold. The Court held that, according to the terms of the mortgage-deed, the estate passed to the assignees. But Lord *Lyndhurst*, C. B., whose judgment it is wished to refer to, said it was clear, as between landlord and tenant, the machinery might be removed by the latter, if it had been put there by him; as between heir and executor, it would have passed to the executor; and after applying the cases of *Lawton v. Lawton* and *Lawton v. Salmon*, his Lordship proceeded to remark that the Court thought that this machinery, erected for the purposes of trade, where by custom such machinery was removable,

and that without injury to the freehold, was not to be considered as belonging to the inheritance, but was personal estate. *Trapps v. Harter*, 3 Tyrwh. 603.

*Decisions reconsidered.* — Notwithstanding the express decision of the cider-mill case, and the strong expressions of the learned Judges whose judgments have been just cited, recognizing the exception in favour of trade fixtures as between heir of tenant in fee and executor; yet there are some very learned gentlemen who still hold that the ancient rule prevails, with its original strictness, in cases between these parties. It is requisite, therefore, to examine these authorities more carefully, in order to see if there be any ground for such an inference.

It will be recollected that Lord *Hardwick*, in the case of *Lawton v. Lawton*, 3 Atk. 15., says, “ Since the time of Henry the Seventh, the general ground the courts have gone upon of relaxing this strict construction of the law, is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the Seventh’s time, as removing wainscot fixed only by screws and marble chimney-pieces, is now allowed to be done. It is true the old rule of law has indeed been relaxed, *chiefly* between landlord and tenant, and not *so frequently* between ancestor and heir-at-



law, or tenant for life and remainderman. But, even in these cases, it does admit the consideration of public conveniency for determining the question. I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir." So in *Dudley v. Ward*, Ambl. 114., his Lordship said, "his judgment was partly founded upon the reasons there mentioned, and partly on the case of the cider mill." Mr. Justice *Buller* was of the same opinion, for he enumerates this case, fo. 34. in his *Nisi Prius*, amongst *trade fixtures*. So Lord *Kenyon*, in *Dean v. Allalley*, 3 Esp. N. P. 11., recognizes the cider mill case. As does Lord *Ellenborough* in *Elwes v. Maw*, 3 East, 34., in which his Lordship says, "As between heir and executor, the rule obtains with the *most rigour* in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been annexed thereto." Now it would seem that all his Lordship meant to say was, that greater latitude had been admitted in favour of trade between landlord and tenant, and tenant for life or in tail and remainderman, than between heir and executor; he does not say that no relaxation obtains in this latter case, but that the law has been construed less favourably in the case of heir and executor than in the two former; or, in other words, that many things might be removed in the two former cases that could not in the latter;

and this reading of his lordship's words will make him perfectly consistent with the expressions of *Lord Hardwick* in the cases of *Lawton v. Lawton*, where he says, that "the exceptions in these cases are not *so frequent* as in the other," and *Dudley v. Ward*; and with *Lord Kenyon* in *Dean v. Allally*. But it would appear that *Lord Hardwick*, in *Ex-parte Quincy*, 1 *Atkins*, 477., has said, "the rule as to fixtures between heir and executor is another thing; the freehold descending on the heir, the executor cannot enter to take away fixtures without being a trespasser. But there is another rule between landlord and tenant." This is, no doubt, inconsistent with what his lordship has said in the cases already referred to; but it must be recollected that it was a mere *obiter dictum*, the point was by no means before the court. So Mr. Justice Buller, N. P., p. 34., adverting to the exceptions in favour of landlord and tenant for life or in tail and remainderman, says, that the rule still holds between heir and executor. This is also inconsistent with his classifying the case of the cider mill along with trade fixtures. The weight of these authorities seems to be in favour of the relaxed rule, although it may be a difficult point to ascertain what is the precise nature of the articles which would now-a-days be held to come within the exception.

It remains still to be considered, whether the

case of *Lawton v. Salmon* can be distinguished from those already referred to.

It does not appear from the judgment of *Lord Mansfield* in this case, that his lordship did not consider the case of the cider mills not to be law ; all he says is, " But I cannot find that between *heir and executor* there has been any relaxation of this sort, except in the case of the cider mill, which is not printed at large." This would seem, at first sight, to throw doubt on the case ; but it is submitted that his lordship did not mean to do so, for he evidently did not consider it, with that then under judgment, a case in point ; for he goes on to say, that " the present is a very strong case," showing that he did not consider it governed by the cider-mill case, and he entirely puts his decision upon the ground that the erection was accessory to the realty, and not for the purpose of trade, for he says, " the salt spring is a valuable inheritance, but no profit arises from it unless there is a salt work, which consists of a building, &c. for the purpose of containing pans, which are fixed to the ground. The inheritance could not be enjoyed without them ; they are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance ; he could never mean to give them to the executor, and put him to the expense of taking them away without any advantage to him.

On the reason of the thing, therefore, and the *intention* of the testator, they must go to the heir."

Now in the cider-mill case a profit would have arisen from the apples independently of the mill; it was not, therefore, requisite that there should be a mill to enjoy the inheritance, and the inheritance might have been enjoyed before the mill was erected; besides, the mill might have been erected at a distance from the land and the apples carried there to it, which would seem to show that the mill must have been erected for the purposes of trade; whereas the saltpans were not of any use except at the spring, where the brine could with facility be conveyed to them: if the pans had been erected at a distance from the spring, as the cider mill could from where the apples grew, the brine could not have been carried to them, as the apples could to the cider-mill.\* This distinction would indicate that the saltpans must have been considered as accessaries to the realty, and not for the purposes of trade.

An essential ingredient in the exception of fixtures from the old rule of law in favour of trade, is, that the fixtures shall be available for the purposes of the particular trade wherever the party erecting them pleases to carry it on; here the saltpans would have been of no use, they were only valuable as "*old materials*," unless on the spot

where the springs were\* ; and this equally applies to the cases of fire-engines in collieries, with this further argument, used by *Lord Chancellor Hardwick* in *Dudley v. Ward*, 1 Ambl. 114., proving that they were erected for the purposes of trade, viz. "that the collieries were worked before engines were invented." And they are of equal use if removed to another pit ; they do not lose their character of chattels, they remain entire ; which would not have been so with the saltpans had they been removed.

Nothing can be more difficult than to collect from these cases any distinct principle, arising, in a great measure, from the inaccurate report of the cider-mill case : each case must more or less depend upon its own particular circumstances. It may, perhaps, be collected from the cases, that where the trade can be carried on, though not to so great advantage, without the particular machinery, as in the case of the sale of apples without the instrumentality of a cider mill, or where a coal mine may be worked without the engine, then the executor may remove it ; but where the profit cannot be enjoyed without the machinery, as in the case of saltpans, then they descend to the heir-at-law. It must be borne in mind, that

\* It may be said that the brine could be conducted to any distance by means of pipes ; but this could not be so, where there was a mere easement or right of way to the salt springs.

articles, the severance of which will prejudice the inheritance, will not be permitted to be removed.

In *Davis et al. v. Jones et al.*, *antè*, p. 5., the custom of the county was a matter of consideration with the court. See *Vin. Abr. tit. Exrs. (U.) 74.*; see *Trapps v. Harter*, 3 *Tyrwh.* 603., per *Lord Lyndhurst*.

*Criminal Case.* — The rule has been relaxed in *favorem vitæ*, where the question was, whether the breaking open a cupboard, let into the wall, constituted a burglary. *Fortes. Cr. C.*, 109.

## SECTION III.

*Of the Right of Executor of Tenant in Fee in respect of Fixtures set up for the Purposes of Ornament and Convenience or domestic Use, and of Agriculture.*

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*Injury to Freehold. — Furnaces. — Pictures and Glasses. — Pier Glasses, Hangings, &c. — Chimney-pieces. — Tapestry, &c. — Set Pots, Ovens, &c. — Stoves, Grates, &c. — Stoves, Cupboards, Grates. — Agriculture.*

IT is proposed, now, to consider how far erections for mere ornament and convenience, or domestic use, may be removed by the executor as against the heir. And after a careful review of the authorities, it will be found that the law is by no means settled, that the executor of the tenant in fee has any right to remove such annexations.

*Injury to Freehold.*—It may first be premised, that if such articles be so annexed to the freehold, as that the inheritance would be maimed and disfigured by their removal, the executor will not be entitled to take them away.

*Furnaces.*—The ancient rule of law received no relaxation in favour of this class of fixtures until the year 1701, when the case of *Squier v. Mayer*, 2 Freem. 249., came before the Lord

Keeper *Wright* in the Court of Chancery, in which it was held, that furnaces, though fixed to the freehold and purchased with the house, and also the hangings nailed to the walls, should go to the executor and not to the heir.

*Pictures and Glasses.* — But in the next case of *Cave v. Cave*, 2 Vern. 508., the same judge was of opinion, “that although pictures and glasses were, generally speaking, part of the personal estate, yet, if put up instead of wainscot or where otherwise wainscot would have been put up, they shall go to the heir. The house ought not to come to the heir maimed and disfigured. Herlakenden’s case, wainscot put up with screws shall remain with the freehold.”

*Glasses, Hangings, &c.* — In the case of *Beck v. Rebow*, 1 P. Wms. 94., before Lord Keeper *Cowper*, the case of *Squier v. Mayer*, *antè*, p. 30., was much strengthened, for, there, it was held, on a bill filed in Chancery to compel, (under a covenant made by a testator, to convey a house and *all things affixed to the freehold thereof*,) the conveyance of pier glasses, hangings, and chimney glasses, which the devisee in trust had removed, and which were fixed as wainscot, with screws and nails, to the freehold; there being no wainscot under them; and it was urged, that as they would go to the heir and not the executor, so they should be conveyed to the plaintiff as the purchaser of the



house); "that hangings and looking-glasses were only matter of ornament and furniture, and not to be taken as part of the house or freehold."

*Chimney-pieces.* — In *Dudley v. Ward*, *antè*, p. 15., *Lord Hardwick* says, "that chimney-pieces are removable by the tenant, as between him and the landlord, if he erected them; but this does not hold between heir and executor."

*Tapestry, &c.* — In *Harvey v. Harvey*, 2 *Str.* 1141., which was an action of trover by an executor against the heir, it was held by *Lee C. J.*, at *Nisi Prius*, that hangings, tapestry, and iron backs to chimneys belonged to the executor.

*Set Pots, Ovens, &c.* — Yet, in *Winn v. Ingleby*, *Bart. and Hauxwell*, 5 *B. & Al.* 625., it was held, that a sheriff has no right under a *fieri facias* to seize fixtures, where the house in which they are situated is the freehold of the person against whom the execution issues. The action was in trespass against the sheriff for seizing certain fixtures, viz. set pots, ovens, and ranges fixed in the plaintiff's house: the plaintiff had a verdict, and on motion to enter the verdict for the defendant, the court said, these fixtures would go to the heir and not the executor, and they were not liable to be taken as goods and chattels under an execution.

*Stoves, Grates, &c.* — Again, in *Colegrave v. Dias*, 2 *B. & C.* 76., which was an action of trover for the recovery of fixtures, consisting of stoves,

grates, kitchen-ranges, closets, shelves, brewing coppers, cooling coppers, mash-tubs, locks, bolts, blinds, &c., which were divided into three classes, some of these were admitted to be annexed to the freehold, which were in the first class; those in the second consisted of stoves, cooling coppers, and blinds, and *Bayley J.* said, "The general rule relating to the right to fixtures is that between heir and executor, and as between them the second class of articles would belong to the heir;" and *Abbott C. J.* said, "The rule of law is most strict between heir and executor; according to that rule, the articles in the two first classes mentioned by plaintiff's counsel would be considered as parcel of the freehold."

*Stoves, Cupboards, Grates, &c.*—In *Rex v. St. Dunstan*, 4 B. & C. 686. (which was a settlement case), the question for consideration was, whether certain stoves, cupboards, and grates were parcel of the demised tenement; the stoves and grates did not originally belong to the house, but the landlord had purchased them; they were fixed with brickwork in the chimney-places, and might be removed without doing any injury. The cupboards stood on the ground and were supported by holdfasts, and might also be removed without doing any other injury to the walls than leaving a few nail marks, and the court held that they were parcel of the demised tenement; *Bayley J.* observing, that although these fixtures might be

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removed by the tenant during his term, if they actually belonged to him, yet, as they were parcel of the freehold, they belonged to the landlord, and would have gone to his heir and not to his executor.

*Agriculture.* — See p. 63.

## CHAPTER III.

SECT. I. *Of the Right to Fixtures as between Tenant for Life and the Remainderman.*

SECT. II. *Of the Right to Fixtures as between Tenant in Tail and Reversioner.*

SECT. III. *Of the Right to Fixtures as between the personal Representatives of Tenants for Life, or in Tail and Remainderman, or Reversioner, and herein of Fixtures set up for the Purposes of Trade, or in relation to Trade, in part.*

SECT. IV. *As respects Fixtures set up by Tenants for Life, or in Tail and the Remainderman, or Reversioner, and their personal Representatives, for the Purposes of Ornament and Convenience, or domestic Use, and Agriculture.*

## SECTION I.

*Of the Right to Fixtures as between Tenant for Life and the Remainderman.*

*Cases in preceding Chapter applicable to present.—Tenant for Life cannot commit Waste.—Cannot carry away Glass Windows.—Nor Wainscot, Benches, Doors, &c.—Timber.—Dower, Courtesy, &c.*

*Cases in preceding Chapter applicable to the present.—It has been already observed, antè, p. 11., that the right to disannex chattels personal af-*

fixed by the tenant for life, or, in tail, to the freehold, as against the remainderman or reversioner, is considered more favourably for executors than in the case of the heir of tenant in fee and executor, which formed the subject of the preceding pages: it would seem to follow, therefore, that the cases there cited and the comments made upon them will equally apply to the class of persons whose rights are now under consideration; and the reader is therefore referred to them, particularly those of *Lawton v. Lawton* and *Dudley v. Ward*.

*Tenant for Life cannot commit Waste.* — A tenant for life, unless expressly exempted by limitation, is not permitted to commit any kind of waste. Therefore, if glass windows, though put in by the tenant himself, be broken or carried away, it is waste. Cru. Dig. 3. ch. 2. s. 13. 4th ed.

*Wainscot, Benches, Doors, &c.* — So it is of wainscot, benches, doors, furnaces, and the like, annexed or fixed to the house either by the reversioner or the tenant. 1 Inst. 534.; Cru. Dig. 3. ch. 2. s. 13. 4th ed.

In Cruise's Digest it is said, "Although tenants for life are entitled to reasonable estovers, yet they are prohibited from destroying those things which are not included in the temporary profits of the land, because that would tend to the permanent and lasting loss of the person entitled to the

inheritance. This destruction is called waste\*," Com. Dig. tit. 3. ch. 2. sec. 1.

It is clear, therefore, that the severance by tenant for life of any chattel attached to the freehold would be waste; from which it would follow, that if he have any right to do so, the exception has been established by the law of fixtures, and not by any power incident to his estate in the land. Not so, however, with respect to tenant in tail; see *post*, p. 30.

*Timber.*—A tenant for life has but a special interest in the trees growing on the land, so long as they are annexed to it; and if he or any other person sever them from the land, the interest of the tenant for life in them is thereby determined, and they become the property of the owner of the inheritance. Bowle's case, 1 Co. 79.; Cru. Dig. tit. 2. ch. 2. s. 38., Id. tit. 3. ch. 2. s. 2.

It is the same when the timber is severed from the land by accident, as when it was blown down it was decreed to belong to the first remainderman in tail. *Newcastle v. Vane*, 2 P. W. 241.

*Without impeachment of Waste.*—But it has been

\* A tenant for life is not entitled to the timber until actually felled; he cannot convey it to another, nor does an authority by him given to another to cut down timber convey any interest, and if not executed in his lifetime is revoked by the death of the party giving it. *Cholmeley v. Paxton*, 3 Bing. 207. See also *Wolf v. Hill*, 2 Swanst. 149 n.; *Cockerell v. Cholmeley*, 3 Russ. 570.; *Davies v. Wentcomb*, 2 Sim. 426.; *Cockerell v. Cholmeley*, 1 Russ. & My. 420.

long settled, that if an estate for life be limited without impeachment of waste, the tenant for life has a right to fell timber, and has the property in all timber trees felled or blown down. *Pyne v. Don.* 1 T. R. 55.; *Smythe v. S.* 2 Swanst. 251.; Cru. Dig. tit. 3. ch. 2. s. 54. This power must be also exercised during the life of the tenant for life, and cannot be delegated to another person so as to enable such person to execute it after his death. *Antè*, p. 37 *n.* Cru. Dig. tit. 3. ch. 2. s. 56. The clause without impeachment of waste is, however, so far restrained in equity, that it does not enable a tenant for life to commit malicious waste so as to destroy the estate. See the cases on this subject collected in Cru. Dig. tit. 3. ch. 2. s. 54. et seq.

*Dower, Courtesy, &c.*—The rights of all other tenants for life, as in dower, by the courtesy, &c. &c., would seem to be governed by the same rules with respect to severing chattels affixed to the freehold as those which govern the rights of tenants for life, or tenants for life without impeachment of waste.

## SECTION II.

*Of the Right to Fixtures as between Tenant in Tail and Reversioner.*

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*May commit Waste.—Power incident to Estate.*

*May commit Waste.*—A TENANT in tail may commit every kind of waste.\* In Cruise's Digest, tit. 2. ch. 1. s. 32., it is said, "that a tenant in tail having an estate of inheritance has a right to commit every kind of waste, by felling timber, pulling down houses, &c., but the power must be exercised during life, for at the instant of his death it ceases. If, therefore, a tenant in tail sell trees growing on the lands, the vendee must cut them down during the life of the vendor, otherwise they will descend to the heir as part of the inheritance." Plowd. 259. Liford's case, 11 Co. 50 a.

*Power incident to Estate.*—The right of a tenant in tail, or, tenant for life without impeachment of waste, to remove annexations to the freehold is quite independent of the law of fixtures, their mode or purpose of annexation. He derives his right from a power incident to an estate in land, and not from the law of fixtures. *Antè*, p. 37.

\* And a court of equity will not restrain him. *Cas tem.* Talbot, 16.; *Cru. Dig.* tit. 2. ch. i. s. 34.



## SECTION III.

*Of the Right to Fixtures as between the personal Representatives of Tenants for Life or in Tail and Remainderman or Reversioner, and herein of Fixtures set up for the Purposes of Trade, or in relation to Trade, in part.*

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*Power of Executors supported by Law.—Their Rights greater than between Heir and Executor.—Fire-Engine Cases recognised.—Inference to be drawn from them.*

*But the Power of Executor is supported by Law.* — THE right of the executor of the tenant for life without impeachment of waste, or tenant in tail to remove fixtures attached to the freehold, is not, like that of the testator himself, dependent upon an incident to the estate in land, but is supported by the law on the ground of public benefit and convenience.

*Their Rights greater than between Heir and Executor.* — The indulgence, it will be recollected, extended to the representatives of these persons, is greater than between heir and executor, but not so great as that between landlord and tenant; and therefore, although in considering what particular description of fixtures is removable and what not, it may be assumed with some degree of confidence, whenever, as between the particular tenant's representative and the reversioner, a removal would be

permitted, so it would be in a similar case between landlord and tenant. Yet it by no means follows, because fixtures are removable between landlord and tenant, that they are so between the representatives of the particular tenant and the reversioner; so neither does it follow that because fixtures are removable between such parties, so they would be removable between heir and executor, although the converse is true, the privileges in the two former cases being greater than in the latter.

The first case which is an express decision between the parties in question, is one which has already been commented on at some length under the division of heir and executor, *antè*, p. 19. Not that it was considered a case really between those parties, but in consequence of the judgment of the Lord Chancellor, in which he made some strong observations on their rights. As this, however, is the proper place to introduce the case, it will be found requisite to go more at large into it than has yet been done.

*Fire-Engine.*—The case alluded to is that of *Lawton v. Lawton*, 3 Atk. 13., before Lord *Hardwick*, Chancellor. The facts of the case as reported are very meagre; it appears, however, that the testator was tenant for life of certain collieries, whereon he set up a fire-engine for the benefit thereof; that over the engine there was a building of sheds for securing it, in which they left

holes for the ends of timber to make it more commodious for removal; that they were capable of being carried from one place to another, and that it was customary to remove them; but evidence was produced on the part of the defendant to show that the engine could not be removed without tearing up the soil and destroying the brickwork. The suit was instituted by a creditor of the testator against the remainderman, and the question was, whether the fire-engine should be considered as personal estate and go to the executor, or fixed to the freehold, and go to the remainderman; and it was held that the fire-engine was personalty, and should go to the executor, and not to the remainderman.

And his Lordship, in delivering his judgment, makes the following remarks: — “It does appear in evidence that, in its own nature, the fire-engine is a personal movable chattel, taken either in part or in gross, before it is put up; but then it has been insisted that fixing it, in order to make it work, is properly an annexation to the freehold. To be sure, in the old cases they go a great way upon *the annexation* to the freehold; and so long ago as Henry the Seventh’s time the courts of law construed even a copper and furnaces to be part of the freehold. Since that time, the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants

for life to do what is advantageous to the estate during their term."

His Lordship proceeds to illustrate this by showing instances of relaxation of the old rule of law, and answers the two objections raised by the remainderman, viz. That you shall not destroy the principal thing by taking away the accessory, and that it must be deemed part of the estate, because it cannot subsist without it, by observing, "that the first maxim does not apply, for the walls are not the principal thing, as they are only sheds to prevent any injury that might otherwise happen to it;" and to the second objection, "that collieries formerly might have been enjoyed before the invention of engines; and therefore this is only a question of *majus et minus* whether it is more or less convenient for the colliery."

And continues: "There is no doubt but the case would be very clear between landlord and tenant. It is true the old rules of law have been relaxed chiefly between landlord and tenant, but not so frequently between ancestor and heir-at-law, or tenant for life and remainderman. But even in these cases, it does admit the consideration of public convenience for determining the question. One reason that weighs with me is, its being a mixed case, between enjoying the profits of the land, and carrying on a species of trade; and considering it in this light it comes very near

the instances in brewhouses, &c., of furnaces and coppers."

"This is not the case between an ancestor and an heir, but an intermediate case, as Lord *Hobart* calls it, between a tenant for life and a remainderman. Which way does the reason of the thing weigh most — between a tenant for life and a remainderman and the personal representative of the tenant for life; or between the ancestor and his heir? and the personal representative of the ancestor? Why, no doubt, in favour of the former; and the case comes near the case of a common tenant, when the good of the public is the material consideration which determines the Court to construe these things personal estates, and is like the case of *emblems*, which shall go to the executor and not to the heir or remainderman, it being for the benefit of the kingdom, which is interested in the produce of corn and other grain, and will not suffer them to go the heir.'

"It is very well known that little profit can be made of coal mines without this engine, and tenants for life would be discouraged in erecting them if they must go from their representatives to a remote remainderman, when the tenant for life might possibly die the next day after the engine was set up."

"These reasons of public benefit and con-

venience weigh greatly with me, and are a principal ingredient in my present judgment."

The next case is that of *Dudley v. Warde*, Ambl. 112. 2d ed. The facts of the case were these: — Lord Dudley died intestate, seised either as tenant for life or in tail (it did not appear which) of an estate on which he and his father, who was tenant in tail, had erected certain fire-engines for the purpose of working certain collieries; and the personal representative\* filed his bill against the defendant, who was the remainderman of the estate, to have the fire-engines delivered up as part of the personal estate of Lord Dudley; and the question, so far as it affects the present work, was, whether fire-engines of this nature, erected by a particular tenant, or, by tenant in tail, are to be considered as part of the owner's real or personal estate; and

Lord *Hardwick*, Chancellor, after speaking of the rule as to principal and accessory, says, "The case being between executor, of tenant for life\*, or, in tail and remainderman is not quite so strong as between landlord and tenant, yet the same reason governs it, if tenant for life erect such an engine. In *Lawton v. Lawton* it was determined it should go to executors partly on the reasons there mentioned, and partly on the authority of the cider-mill case. The case of *Lawton v. Lawton* was the case of creditors; but that makes no

\* See 1:Ambl. 113. n. 1. 2d ed.

difference, because the question is, whether part of the real, or personal estate. If it is so in the case of tenant for life, Query, how it would be in the case of tenant in tail? Tenant in tail has but a particular estate, though somewhat higher than tenant for life. In the reason of the thing there is no material difference; the determinations have been from consideration of the benefit of trade. A colliery is not only an enjoyment of the estate, but in part carrying on a trade. The reason of emblements going to the executor of a particular tenant holds here, to encourage agriculture. Suppose a man of indifferent health: he would not erect such an engine at a vast expense unless it would go to his family. It is no argument to say the colliery could not be worked without these engines; they are of late invention, not above forty years ago. How were collieries worked before? They may be more beneficially worked than without them." and his Lordship decreed that the engine erected by the intestate should go to his administrator.

*Cases recognised.* — These decisions have been several times recognised and confirmed: see *Lawton v. Salmon*, where Lord *Mansfield*, after speaking of the exception to the old rule of law in favour of tenant as against his landlord, remarks, "There has been also a relaxation in another species of cases between tenant for life and remainderman, if the former have been at any

expense for the benefit of the estate, as by erecting a fire-engine, or any thing else by which it may be improved. In such a case it has been determined that the fire-engine shall go to the executor, on the principle of public convenience: being an encouragement to lay out money in improving the estate which the tenant would not otherwise be disposed to do." And *Penton v. Robart*, where Lord *Kenyon* says, "And some of the cases have even gone further in favour of the executor of tenant for life against the remainderman, between whom the rule has been holden stricter, for it has been determined that the executor of tenant for life was entitled to take away the fire-engine of a colliery." See also *Elwes v. Maw*, 3 East. 54.\*

*Inferences to be drawn from them.* — The conclusion to be drawn from these cases is, that fixtures of the description of those in question are to be considered, in consequence of their relation to trade, in the nature of personal chattels; that when set up for the purpose of enjoying the profits of the land and carrying on a trade, they are to be considered as a *mixed* case, and shall pass to the executor; that they hold a strong analogy to those cases which have arisen between landlord and tenant, and which establish the

\* It seems fire-engines would pass under a bequest of things in the nature of personal estate. See *post. tit. DEVISEE.*



exception to the general rule, *quicquid plantatur solo, solo cedit*, in favour of fixtures set up for the purposes of trade. Yet it must be recollected that in the application of any principle established by these cases, the particular state of facts must not be lost sight of as a principal ingredient in arriving at any thing like a correct conclusion. It should be ascertained, therefore, whether the removal of the particular chattel would damage the estate; whether the inheritance can be enjoyed without the chattel; whether the chattel form the principal or accessory; and other points which a careful consideration of the foregoing judgments will suggest. See *antè*, p. 5.

## SECTION IV.

*As respects Fixtures set up by Tenants for Life or in Tail and the Remainderman or Reversioner and their personal Representatives, for the Purposes of Ornament and Convenience or domestic Use; and Agriculture.*

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*Cases between Heir and Executor applicable.—Agriculture.*

*Cases between Heir and Executor applicable. —* THE exception to the old rule of law, *quicquid plantatur solo, solo cedit*, in favour of the executor of a tenant in fee simple as against his heir holding with greater strictness than in these cases, where a dispute arises between the representatives of tenant for life or in tail and remainderman or reversioner, it may fairly be assumed, therefore, that whenever the executor would be permitted to remove fixtures set up for the purpose of ornament and convenience or domestic use as against his heir, so likewise would the executor of tenant for life or in tail as against the remainderman or reversioner. Should, however, none of these cases be in point, the general rules on which other cases have been determined must be taken into consideration, bearing in mind the manner in which the particular chattel is affixed, as well as its con-

struction, and also whether any injury will result from its removal, to the reversion.

It will be observed, also, that when the executor was permitted to remove ornamental fixtures as against the heir, as in *Harvey v. Harvey*, *antè*, p. 32., *Squier v. Mayer*, *antè*, p. 30., and see *Beck v. Rebow*, *antè*, p. 31., the fixtures were very slightly affixed to the freehold, and were more in the nature of chattels than fixtures properly so called.

*Agriculture.* — See Landlord and Tenant, *post*, p. 63.

## CHAPTER IV.

**SECT. I.** *Of the Right to Fixtures as between Landlord and Tenant.*

**SECT. II.** *As to the Right of a Tenant to remove Fixtures set up in relation to Trade, or to Trade, in Part.*

**SECT. III.** *Of the Right to remove Fixtures set up for Agricultural Purposes.*

**SECT. IV.** *Of the Right to remove Fixtures set up for Ornament or Convenience and domestic Use.*

### SECTION I.

*Of the Right to Fixtures as between Landlord and Tenant.*

*Chapter confined to those Rights conferred by the Law of Fixtures. — Fixtures must be annexed. — Ancient Rule.*

*Chapter confined to those Rights conferred by the Law of Fixtures. —* As landlords and tenants have it in their power to control their liabilities by contract in respect of fixtures, it is proposed to discuss, in this chapter, their rights with reference to the mere relation of landlord and tenant, independently of a contract, reserving for another chapter the discussion of those rights as affected by the express contract of the parties.

*Fixtures must be annexed.*—It must be borne in mind, that unless the particular fixtures are attached, in legal contemplation, to the freehold, they do not come within that class of cases which forms the subject of this work; wherever, therefore, the building, whether it be erected for a trading purpose or not, is not fastened to or let into the freehold, it retains its character of a mere chattel, and is not a fixture, and the tenant has a clear right to remove it; of this description of chattels is the case of *Culling v. Tuffnal*, *antè*, p. 3., and also the case of *Davis et al. v. Jones et al.*, 2 B. & Ald. 165.; and see *Horn v. Baker*, 9 East, 215.

*Ancient Rule.* — It has been already observed that the ancient rule of law, viz. whatever the tenant has affixed to the freehold during the term cannot be afterwards removed by him or his representatives or assigns, has been always less rigorously construed in favour of the tenant in cases between him and his landlord, than in the instances which formed the subject of the preceding chapters, and therefore the cases there mentioned may be considered as authorities between the parties whose rights are now under consideration, and the reader is referred to them as useful auxiliaries to the solution of any question in which, in practice, a doubt arises.

## SECTION II.

*As to the Right of a Tenant to remove Fixtures set up in relation to Trade, or to Trade, in part.*

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*Exceptions early established.—Furnaces, Dyers' Fats, Bakers' Fixtures.—The Right now established.—Fats, Coppers, Tables, &c., erected by Soap-boilers.—Reason why removable.—Dutch Barns, Sheds, &c.—Argument to show that they were not Agricultural Fixtures.—The Case is not against the general Principle.—Varnish Manufactory.—Machinery of a Mill.—Blacksmiths' Bellows, &c.—Lime Kiln.—Whether extensive Buildings removable.*

*Exceptions early established.*—IN very early times exceptions were engrafted upon this ancient rule in favour of the tenant's right to remove fixtures erected for various purposes as against his landlord, and these decisions have received the sanction of the superior courts down to the present day.

Very soon after the passing of the statutes of Marlbridge and Gloucester, questions between landlord and tenant were mooted in actions of waste, as to the right of lessee engaged in trade, and who had set up fixtures for the purpose of more advantageously carrying on his trade, to remove them at the expiration of his term. See

42 E. 3. 6 Pl. 19. But it was not long ere the point met with a direct decision. For

*Bakers' Fixtures, &c., Furnaces, Dyers' Fats, &c.*

—In 20 H. 7. 13. 24., it was expressly laid down that if a lessee for years erect any furnace for his advantage, or a dyer set up fats or vessels to occupy his occupation, he may remove them during the term. “*Si le lessee per ans fait ascun furneis pur son avantage, ou dier fait des fats et vaissels pur occupier son occupation, durant le terme il peut remuer eux et sic d'un baker.*” But this case did not stop here, for it also pointed out the time within which the removal must take place. See *post*.

Here, then, is an express authority that a lessee for years may move furnaces erected *pur son avantage*, which must clearly mean for some purpose by which he can derive a profit; for if it were otherwise, it could not be “for his advantage,” and that, it is conceived, can only be in the way of his trade: and that it was in relation to trade that this exception was established, is further proved by the two other cases alluded to in the decision, viz. the dyer and the baker, both of which were certainly mentioned with reference to trade; and the noticing these two cases in illustration, as it were, of the point at issue, shows that, that was the intention of the court; for if it were not so, they would have put some other parallel case, and not those of traders.

This case, then, establishes an exception to the old rule in favour of furnaces erected for the tenant's advantage, that is, for the purposes of trade, fats and vessels erected by a dyer to carry on his occupation, and those fixtures erected by a baker in the way of his trade, which, it is apprehended, has reference to ovens, &c. See a very able note on this case by Mr. Smith, in his most valuable work, 2 Leading Cases, 115.

The two or three next cases, however, which follow this decision, went upon a totally different ground, viz. the mode of annexation. See 21 H. 7. 26.; *Cook v. Humphry*, Moore, 177.; *Day v. Austin*, Owen, 70.; Cro. El. 374.

*The Right is now established.*—But whatever may have been the decisions of the earlier authorities, the privilege of removing trade fixtures is now established beyond doubt.

*Fats, Coppers, Tables, &c. erected by Soap-boiler.*—As early as Queen Anne, in a case which came before Lord *Holt* at Nisi Prius, in a special action on the case against the sheriff for damage done to a house in Holborn in consequence of his removing certain fats, coppers, tables, partitions, the backsides of which were paved and set up by a tenant who was by trade a soap-boiler, for the convenience of his trade, under a writ of fieri facias issued on a judgment in debt against the tenant, and thereby leaving the house stripped and in a ruinous condition, and his Lordship held



that "during the term the soap-boiler might well remove the fats he set up in relation to trade, and that he might do so by the common law (and not by virtue of any special custom) in favour of trade to encourage industry. But after the term they became a gift in law to him in reversion, and are not removable. That there was a difference between what a soap-boiler did to carry on his trade and what he did to complete the house, as hearths and chimney-pieces (which he held not removable); that the sheriff might take them in execution as well as the under lessee might remove them, and so this was not like tenant for years without impeachment of waste; in that case he allowed the sheriff could not cut down and sell, though the tenant might; and the reason is, because in that case the tenant hath but a mere power without an interest, but here the under lessee hath an interest as well as a power, as tenant for years hath in standing corn, in which case the sheriff can cut down and sell." Poole's case, 1 Salk. 378.

*Reason why removable.*—And so in *Lawton v. Lawton*, *antè*, p. 41., the facts of which case are there stated. Lord *Hardwick* says, "Since the time of Henry the Seventh the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term; coppers and all sorts of brewing vessels cannot

possibly be used without being as much fixed as fire-engines; and in brewing-houses especially, pipes must be laid through the walls and supported by walls; and yet notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them. There is no doubt but the case would be very clear as between landlord and tenant."

Again, the same learned judge, in *Dudley v. Warde*, the facts of which case are stated, *antè*, p. 45., says, (in speaking of the old rule of law) "And yet there are some exceptions to that rule, as between landlord and tenant; what is excepted by the latter for the sake of trade may be removed, though fixed to the freehold:" and again, "The determinations have been for the benefit of trade."

And *Lord Mansfield*, in *Lawton v. Salmon*, *antè*, p. 20., takes a similar view; he says, "But there has been a relaxation of the strict rule in that species of cases for the benefit of trade between landlord and tenant; that many things may now be taken away which could not be formerly, such as erections for carrying on any trade, marble chimney-pieces, and the like, when put up by the tenant. This is no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefited." "It would have been a different thing if the springs had been let, and the tenant had been at the expense of erecting these salt-works; he

might very well have said, I leave the estate no worse than I found it: that, as I before stated, would be for the encouragement and convenience of trade and the benefit of the estate."

This case has been recognised in *Mansfield (Earl of) v. Blackbourn*, 6 Bingh. N. C. 426.

*Dutch Barns, Sheds, &c.*—In *Dean v. Allalley*, which was a case at Nisi Prius, before *Lord Kenyon*, the facts of which were these: a tenant, during his term, had erected certain sheds called Dutch barns; the sheds had a foundation of brickwork in the ground, and uprights fixed in and rising from the brickwork supporting the roof, which was composed of tiles, and the sides were open, and his Lordship observed, that "the law will make the most favourable construction for the tenant, when he has made necessary and useful erections for the benefit of his trade or manufacture, which enable him to carry it on with more advantage. It has been held so in the case of cider-mills and other cases, and I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term."

*Argument to show they were not Agricultural Fixtures.*—From the observations of *Lord Ellenborough* in commenting on this case, in the course of his judgment in *Elwes v. Maw*, 3 East. 55., it would seem that his Lordship was of opinion,

that these barns had been erected for agricultural purposes; but it is apprehended that no words can more strongly express the impression on *Lord Kenyon's* mind that they were not, but rather were connected with trade, than the language above cited from his Lordship's judgment. There is another *Nisi Prius* case before *Gould J.*, also referred to by *Lord Ellenborough* in the above case, and as to which his lordship observes, that the question, what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before *Mr. Justice Gould* at *Nisi Prius*; that learned judge however said, "that the defendant would clearly have been entitled to take away the fixtures, if he had done it during the continuance of his tenancy from year to year, but that, by the agreement, the parties had made a new contract which put an end to the term." The fixtures in question in this case were, amongst others, a wooden stable, which stood on blocks or rollers which he had before removed from an estate of his own, adjoining to the premises in question; a shed which he had himself built on brickwork, and some posts and rails which he had also erected. *Fitzherbert v. Shaw*, 1 H. Bl. 528.

*The Case is not against the general Principle.* — It will be observed, however, that these fixtures had no reference to trade or manufacture, and *Lord Kenyon*, in *Penton v. Robart*, remarks on

the case, that it turned upon the construction of an agreement that such things should be left on the premises, and decided nothing against the general principle.

*Varnish Manufactory.*—In *Penton v. Roberts*, the following was the state of facts: the defendant, who was a varnish maker, erected a building on the premises for the purposes of his trade. This building had a brick foundation let into the ground, with a chimney belonging to it, upon which a superstructure of wood, brought from another place, where the defendant had carried on his business, was raised, in which the defendant had carried on his trade; this wooden structure he pulled down whilst he remained in possession, and carried away the materials; and for this an action of trespass was brought. The plaintiff obtained a verdict, subject to the question, whether the defendant was warranted in pulling down the building and taking away the materials after the expiration of the term; and *Lord Kenyon* said, “The leaning has always been in favour of the tenant, in support of the interests of trade, which is become the pillar of the state. Here the defendant has done no more than he had a right to do; he was in fact still in possession of the premises at the time the things were taken away.” 2 East. 90. 92., and see S. C. 4 Esp. 33.

*Machinery of a Mill.*—The machinery of a mill is part of the freehold, and cannot be removed

by the tenant. *Farrant v. Thompson*, 2 D. & R. 1.; 5 B. & A. 826.

*Blacksmith's Bellows.*—See *Twiggs v. Potts et al.*, 3 Tyrwh. 969., which was an action of trespass for seizing, severing, and selling, under a distress for rent, a blacksmith's bellows, anvils, and blocks, vices, lathes, shelves, grates, grindstones, and benches. The case, however, went off upon a question of pleading.

*Lime Kiln.*—There was a question raised in *Thresher v. East London Waterworks Company*, 2 B. & C. 608., whether a tenant had a right to remove a lime kiln, which was substantially built of brick and mortar, and whose foundations were let into the ground, the expense of constructing which amounted to 160*l.* The point received no determination.

*Whether extensive Buildings removable.*—It is, nevertheless, a case worthy of great consideration, where any question should arise as to the right of the tenant to remove extensive buildings at the termination of his term, which he had erected for the purposes of his trade. The consequence of a decision in favour of such a right would be most serious, and it is presumed that the courts would hesitate long, in the absence of any authority to that effect, before they would answer the question affirmatively; and there can be very little doubt but that the nature of the construction, and the manner in which the fixture is attached to the

freehold, would form subjects of very grave consideration with any court now-a-days, or even in earlier times, where it was sought to remove a substantial and extensive manufactory, for instance, erected by a tenant for the purposes and convenience of his trade; for it would certainly have the effect of violating a well-received principle, viz. that the principal thing shall not be destroyed by taking away the accessory; *Lawton v. Lawton*; *Dudley v. Warde*; and it is conceived that the courts, acting upon this rule, would not permit the removal of any trading fixture which would have the effect of destroying or doing great and serious injury to some large and important building. If, however, the building be merely an accessory, as was the engine-house in *Lawton v. Lawton*, and merely built to cover it, there one, as well as the other, is removable. *Elwes v. Maw*.

## SECTION III.

*Of the Right to remove Fixtures set up for Agricultural Purposes.*

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*Whether trading Privilege extends to Agriculture.— Contended that the Case is confined to mere agricultural Erections.— Arguments and Cases further considered.— Gardeners and Nurserymen.— Strawberry Beds.— Hothouses and Greenhouses.*

*Whether trading Privilege extends to Agriculture.*  
 —THE leading, and, indeed, the only, direct authority as to the right of a tenant to remove fixtures erected for the purposes of agriculture or husbandry, is that of *Elwes v. Maw*; a case which met with great consideration and deliberation; the result of which was, that the tenant's privilege with respect to fixtures set up for the purposes of trading does not extend to those set up for the purposes of agriculture. The facts of the case appear sufficiently for the present purpose from the judgment of *Lord Ellenborough*, which is in the following words:—

“This was an action upon the case, in the nature of waste by a landlord, the reversioner in fee, against his late tenant, who had held, under a term for twenty-one years, a farm, consisting of a



messuage, and lands, outhouses, and barns, &c. thereto belonging, and who, as the case reserved stated, during the term, and about fifteen years before its expiration, erected, at his own expense, a beast-house, carpenter's shop, a fuel-house, a cart-house, a pump-house, and fold-yard. The buildings were of brick and mortar, and tiled, and the foundations of them were about a foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front, and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. The case further stated, that these erections were necessary and convenient for the occupation of the farm, which could not be well managed without them. And the question for the opinion of the Court was, Whether the defendant had a right to take away these erections? Upon a full consideration of all the cases cited upon this and the former argument, which are indeed nearly all that the books afford materially relative to the subject, we are all of opinion that the defendant had not a right to take away these erections.

“ Questions respecting the right to what are ordinarily called fixtures principally arise between

three classes of persons : 1st. Between different descriptions of representatives of the same owner of the inheritance ; viz. between his heir and executors in the first case, *i. e.*, as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel any thing which has been affixed thereto ; 2dly, between the executor of tenant for life or in tail and the remainderman or reversioner, in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor ; the 3d case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claim in respect to freehold or inheritance, is the case between landlord and tenant."

"But the general rule on this subject is that which obtains in the first-mentioned case, *i. e.* between heir and executor ; and that rule (as found in the Year Book, 17 E. 2., p. 518., and laid down at the close of Herlakenden's case, 4 Co. 64., in Co. Litt. 53., in *Cooke v. Humphrey*, Moore, 177., and in *Lord Darby v. Asquith*, Hob. 234., in the part cited by my brother *Vaughan*, and in other cases) is, that where a lessee, having annexed any thing to the freehold during his term, afterwards takes it away, it is waste. But this rule, at a

very early period, had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it, in favour of trade, and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year Book, 42 E. 3. 6., the right of the tenant to remove a furnace erected by him during his term is doubted, and adjourned. In the Year Book of the 20 H. 7. 13. *a & b*, which was the case of trespass against executor for removing a furnace fixed with mortar by their testator and annexed to the freehold, and which was holden to be wrongfully done, it is laid down, that if a lessee for years makes a furnace for his advantage, or a dyer makes his vats or vessels to occupy his occupation during his term, he may remove them; but if he suffer them to be fixed to the earth *after* the term, then they belong to the lessor; and so of a baker. And it is not waste to remove such things within the term by some; and this shall be against the opinions aforesaid. But the rule in this extent in favour of tenants is doubted afterwards in 21 H. 7. 27., and narrowed there by allowing that the lessee for years could only remove, within the term, things fixed to the ground, and not to the wall of the principal building. However, in process of time the rule in favour of the right in the tenant to remove utensils set up in relation to trade became fully established; and accordingly we find *Lord Holt*, in

Poole's case, Salk. 368., laying down (in the instance of a soap-boiler, an under-tenant, whose vats, coppers, &c., fixed, had been taken in execution, and on which account the first lessee had brought an action against the sheriff,) that during the term the soap-boiler might well remove the vats he set up in relation to trade, and that he might do it by the common law, and not by virtue of any special custom in favour of trade, and to encourage industry: but that, after the term, they became a gift in law to him in reversion, and were not removable. He adds, that there was a difference between what the soap-boiler did to carry on his trade, and what he did to complete his house, as hearths and chimneys, which he held not removable. The indulgence in favour of the tenant for years during the term has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. *Beck v. Rebow*, 1 P. Wms. 94.; *Exparte Quincey*, 1 Atk. 477.; and *Lawton v. Lawton*, 3 Id. 13. But no adjudged case has yet gone the length of establishing that buildings subservient to the purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself who built them, during his term."

"In deciding whether a particular fixed instru-

ment, machine, or even building, should be considered as removable by the executor, as between him and the heir, the Court, in the three principal cases on this subject, viz. *Lawton v. Lawton*, 3 Atk. 13., which was the case of a fire-engine to work a colliery erected by tenant for life, Lord Dudley and Lord Ward, Ambl. 113., which was also the case of a fire-engine to work a colliery erected by tenant for life: these two cases before *Lord Hardwick*; and *Lawton (executor) v. Salmon*, E. 22 G. 3., 1 H. Bl. 259. *in notis*, before *Lord Mansfield*, which was the case of saltpans, and which came on in the shape of an action of trover, brought for the saltpans by the executor against the tenant of the heir at law, the Court may be considered as having decided mainly on this ground, that where the fixed instrument, engine, or utensil, and the building covering the same, falls within the same principle, was an accessory to a matter of personal nature, that it should be itself considered as personalty. The fire-engine, in the cases in 3 Atk. and Ambl., was an accessory to the carrying on the trade of getting and vending coals, a matter of a personal nature. *Lord Hardwick* says, in the case in Ambler, ‘A colliery is not only an enjoyment of the estate, but in part carrying on a trade.’ And in the case in 3 Atk. he says, ‘One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands and carrying on

a species of trade ; and, considering it in this light, it comes very near the instances in brewhouses, &c., of furnaces and coppers.' Upon the same principle, Lord Chief Baron *Comyns* may be considered as having decided the case of the cider-mill ; i. e. as a mixed case between enjoying the profits of the land and carrying on a species of trade, and as considering the cider mill as properly an accessory to the trade of making cider. In the case of the saltpans, *Lord Mansfield* does not seem to have considered them as accessory to the carrying on a trade ; but as merely the means of enjoying the benefit of the inheritance. He says, ' The salt-spring is a valuable inheritance, but no profit arises from it unless there be a salt-work, which consists of a building, &c. for the purposes of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them, they are accessaries necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance.' Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade. If, however, he had even considered them as belonging to the executor, as utensils of trade, or as being removable by the tenant on the ground of their being such utensils of trade, still it would not have affected the ques-

tion now before the Court, which is the right of a tenant, for mere agricultural purposes, to remove buildings fixed to the freehold, which were constructed by him for the ordinary purposes of husbandry, and connected with no description of trade whatsoever, and to which description of buildings no case (except the *Nisi Prius* case of *Dean v. Allalley* before *Lord Kenyon*, and which did not undergo the subsequent review of himself and the rest of the Court) has yet extended the indulgence allowed to tenants in respect to buildings for the purposes of trade. In the case of *Buller's Nisi Prius*, 34., of *Culling v. Tuffnell*, before Lord Chief Justice *Treby* at *Nisi Prius*, he is stated to have holden that the tenant who had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, might, by the custom of the country, take them away at the end of his term. To be sure he might, and that without any custom; for the terms of the statement exclude them from being considered as fixtures; "they were not fixed in or to the ground." In the case of *Fitzherbert v. Shaw*, 1 H. Bl. 258., we have only the opinion of a very learned judge indeed, Mr. Justice *Gould*, of what would have been the right of the tenant, as to the taking away a shed built on brickwork, and some pots and rails which he had erected, if the tenant had done so during the term; but as the term was put an end to by a

new contract, the question, what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at *Nisi Prius*; and when that question was offered to be argued in the court above, the counsel were stopped, as the question was excluded by the new agreement. As to the case of *Penton v. Robart*, 2 East. 88., it was the case of a varnish house, with a brick foundation let into the ground, of which the woodwork had been removed from another place, where the defendant had carried on his trade with it. It was a building for the purpose of trade; and the tenant was entitled to the same indulgence in that case, which, in the cases already considered, had been allowed to other buildings for the purposes of trade; as furnaces, vats, coppers, engines, and the like. And though *Lord Kenyon*, after putting the case upon the ground of the leaning which obtains in modern times in favour of the interest of trade, upon which ground it might be properly supported, goes further, and extends the indulgence of the law to the erection of green-houses and hot-houses by nurserymen, and indeed, by implication, to buildings by all other tenants of land. There certainly exists no decided case, and, I believe, no recognized opinion or practice on either side of Westminster Hall to warrant such an extension. The *Nisi Prius* case of *Dean v. Allalley* reported in Mr. Woodfall's book, p. 207., and Mr. Aspi-



nasse's, vol. ii. 11., is a case of the erection and removal by the tenant of two sheds, called Dutch barns, which were, I will assume, unquestionably fixtures. *Lord Kenyon* says, 'The law will make the most favourable construction for the tenant where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage.' It has been so holden in the case of cider-mills, and other cases; and I shall not narrow the law, but hold erections of this sort made for the benefit of trade, or constructed as the present, to be removeable at the end of the term. *Lord Kenyon* here uniformly mentions the benefit of trade as if it were a building subservient to some purposes of trade, and never mentions agriculture for the purposes of which it was erected. He certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming were, or rather ought to be, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade, but the case of buildings for trade has been always put and recognized as a known allowed exception from the general rule, which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favour of

tenants in the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlord and tenants. But its danger or probable mischief is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation at all; and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case."

*Contended that Case confined to mere Agricultural Erections.*—It has been considered by several very learned and eminent lawyers, who have paid every attention to the law of fixtures, that the case of *Elwes v. Maw* is conclusive against the privilege of all agricultural tenants to remove any kind of fixtures erected on the farm during their term; but it is apprehended, on a careful examination of the case, it will be found to go no such length, nor was it the intention of Lord *Ellenborough* that it should be so considered.

Mr. Smith, in the second vol. of his *Leading Cases*, p. 116., sums up the arguments against Lord *Ellenborough's* decision, to this effect: that his Lordship's opinion, that the doctrine sought to be established by the defendant "was contrary to

the uniform current of legal authority," cannot be maintained; that it has a tendency to confine within narrower limits the privilege of the tenant than the policy which established those limits would justify; that husbandry is equally advantageous with trade to the community, and is often carried on by means of machinery; that many of the occupations of agriculturists are trades; and in support of this view the opinion of Lord *Hardwick* is relied on in *Lawton v. Lawton and Dudley v. Warde*, by which it would seem that he considered the tenant's privilege as extending to fixtures by means of which the tenant carried on a species of trade, thereby rendering the produce of his own land available to his own profit; and in support of this argument the case of nurserymen and gardeners removing trees, &c. is relied on. And his Lordship commences by saying, "We are all of opinion that the defendant had not a right to take away *these* erections." It will appear obvious, therefore, that the Court guarded particularly against the supposition that the judgment was to have reference to any other species of fixtures than those which were then under the consideration of their Lordships, and which have no reference to trade, no reference to manufactures or machinery, but were erected "for *mere* agricultural purposes."

It will be recollected that the fixtures which had been removed in the case of *Elwes v. Maw*

were simply "a beast-house, a carpenter's shop, a waggon-house, a fuel-house, a pigeon-house, and a brick wall enclosing the fold-yard."

*Arguments and Cases further considered.* —

First, then, with respect to the older authorities, and that particularly relied on, viz. 20 Hen. 7. c. 13., as showing that the exception was not there confined to those erections which are made for trade purposes only; it is hoped, that that case has been already answered satisfactorily in the affirmative, *antè*, p. 54.

*Lawton v. Lawton* and *Dudley v. Warde*, and the cider-mill case, show that Lord *Hardwick* and C. B. *Comyns* should have considered the engines and the cider mill not to be removable had it not been for the fact that those fixtures were set up for the purposes of a species of trade; a matter of a mere personal nature.

In the first of these cases Lord *Hardwick* says, "One reason which weighs with me is its being a mixed case between enjoying the profits of the land and carrying on a *species of trade*; and considering it in this light, it comes very near the instances in brewhouses, &c." Lord *Ellenborough*, in *Elwes v. Maw*, says, "Upon the same principle Lord Chief Baron *Comyns* may be considered as having decided the case of the cider mill; that is, as a mixed case between enjoying the profits of the land and carrying on a *species of trade*, and as considering the cider-mill as properly an accessory

to the making of cider;" and again, Lord *Hardwick*, in *Dudley v. Warde*, said, "That a colliery is not only an enjoyment of the estate, but *in part carrying on a trade.*"

The corollary to be drawn from the pains taken by these learned judges to distinguish these particular erections from *mere* agricultural ones shows strongly, that had there not been the accessory for the purposes of trade, they should have decided that they were *mere* agricultural erections, and, as in *Elwes v. Maw*, were not removable by the tenant; and Lord *Ellenborough*'s comments upon these cases, in the course of his judgment in *Elwes v. Maw*, show clearly that if a similar accessory could have been imported into that case, his Lordship would have considered himself bound by it; it is manifest he approves of the distinction, and Lord *Mansfield* seemed to be of the same opinion, if one may judge from the care he takes to show, in the case of *Lawton v. Salmon*, that there was no accessory there of a personal nature. "The salt spring is a *valuable inheritance*," said his Lordship, "but no profit arises from it unless there be a salt work, which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed to the ground. *The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance.*" And Lord *Ellenborough*, in his judgment,

considers these cases reconcilable on these grounds; his Lordship observing, that Lord *Mansfield* did not consider the saltpans as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance. Upon this principle he considered them as belonging to the heir as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor as the means or instrument of carrying on a trade.

From that judgment, and the comments of Lord *Ellenborough* upon it, it is clear that the learned judge who delivered the opinion of the Court, as well as Lord *Ellenborough*, thought that if there had been an accessory of a personal nature, the decision would have been the other way. But it is answered, no; for Lord *Mansfield* said that the pans would have been removable by a tenant. True, so they would; but this very circumstance would have imported that into the case which would alone justify such a decision, viz. that then, it would appear clear that the saltpans were erected for the purposes of trade. Then, there would have been the necessary accessory of a personal nature, upon the want of which the distinction proceeded. The tenant could not be supposed to erect them for the enjoyment of the inheritance, with which he could have nothing to do, *qua* tenant: in such case the natural inference would be, that the tenant erected them for the purposes of trade; and

in this view of the case, it would not affect the decision in *Elwes v. Maw*, which, it is submitted, has reference only to fixtures erected for mere agricultural purposes, as distinguished from those of the mixed nature that have just been commented upon.

So far, then, Lord *Ellenborough* was correct in saying, "But no adjudged case has yet gone the length of establishing that buildings subservient to the purposes of agriculture, *as distinguished from those of trade*, have been removed by an executor of tenant for life, nor by the tenant himself who built them, during the term."

But it is said that in *Fitzherbert v. Shaw*, Mr. Justice *Gould* expressed an opinion at *Nisi Prius* that a tenant was entitled to take away a stable, a shed, and some posts and rails; but this opinion Lord *Ellenborough* treats as strictly extra-judicial, observing, that as the term was put an end to by a new contract, the question what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at *Nisi Prius*. As to the case of *Culling v. Tuffnall*, it is said to have been decided on the ground of custom; but, strictly speaking, as already observed, it did not come within the law of fixtures, owing to its construction.

Again, it is contended that *Dean v. Allalley* is an authority for the removal of fixtures set up for mere agricultural purposes unconnected with

trade. In the first place, it may be answered to this case, that it is a mere *Nisi Prius* decision, which never received the subsequent review of Lord *Kenyon* and the rest of the Court; but even taking it as an authority, it is perfectly manifest that his Lordship never intended to extend the doctrine further than *Lawton v. Lawton* and *Dudley v. Warde* went, viz. that the fixtures in that case were of a mixed nature. He says, "I shall not narrow the law, but hold *erections of this sort, made for the benefit of trade, removable.*" But, at all events, his Lordship considered there was something peculiar in the construction of the building in question, or its mode of annexation; for, speaking of the removal of the restriction in favour of trade fixtures, he says, "*or constructed as the present, removable at the end of the term;*" which shows that there was something peculiar in its construction. The correct state of the facts cannot be collected from the report of the case.

Therefore, so far as the authorities go, there are none to be met with that go a greater length than in saying that where buildings are erected for agricultural purposes in connection with some kind of trade, they shall be removable; but where the erection is made for agricultural purposes *purely*, they shall not be removable. This rule may fairly be drawn from the authorities, and what will constitute *mere* agricultural buildings must be



collected from description of those mentioned in the case of *Elwes v. Maw*.

Another argument is hinged upon the cases of nurserymen and gardeners having the power to remove trees, greenhouses, &c., in support of the extension of the exception in favour of fixtures erected for *mere* agricultural purposes. Those cases, it is apprehended, rest entirely upon custom, or, at all events, upon an implied contract between the landlord and tenant; for the former is aware, when he lets the land, of the purposes to which it is to be converted, and the law would not permit him to turn round on the tenant when the ground was well stocked and say, "These are fixtures, and you cannot remove them," for it is only in the absence of any contract that the law of fixtures applies; but even if it were not so, the land is planted for the purposes of trade, and these cases, therefore, come within *Lawton v. Lawton* and *Dudley v. Warde*. And Lord *Kenyon*, in *Penton v. Robart*, is said to have extended the rule to greenhouses and hothouses erected by such persons, and the above view his Lordship takes; for he says, if they were not permitted to remove such things, "*the very object of their holding would be defeated.*" See *Buckland v. Butterfield*, per C. J. *Dallas*, 4 Moore, 445.

There is another objection urged against Lord *Ellenborough's* judgment, viz. the narrowness of the grounds upon which it rests, and it is said

that it has a tendency to confine the privilege of a tenant within narrower limits than are designated by the policy to which it owes its existence; that there is no good reason for conferring it on trade to the exclusion of husbandry, which is equally advantageous, and which is now, like manufactures, often carried on by the aid of valuable machinery; that many of the occupations of agriculturists are trades.

The answer to this argument is plain and simple, viz. that the case of *Elwes v. Maw* has no such tendency as that imputed to it; all Lord *Ellenborough* has decided is, that a beast-house, a carpenter's shop, a fuel-house, a cart-house, a pump-house, and fold-yard are *mere* agricultural erections, that they are entirely unconnected with trade; his Lordship saying, "If, however, Lord *Mansfield* had even considered the saltpans as belonging to the executor, as utensils of trade, or as being removable by the tenant on the ground of their being such utensils of trade, still it would not have affected the question now before the Court, which is, the right of a *tenant for mere agricultural* purposes, to remove buildings fixed to the freehold, which were constructed by him for the *ordinary* purposes of husbandry, and connected with no description of trade whatsoever." A fair way to test this case is, by supposing one where a trader, in whose right the exception is well established, had erected such fixtures as those

in *Elwes v. Maw*, on the premises where he carried on his trade, would he be permitted to remove them? It is apprehended he would not. So neither, allowing the full benefit of the exception in favour of trade to agriculture, can *such buildings* be considered as accessory to the trade of a farmer. They are no more necessary to the trade of a farmer than they would be to that of a manufacturer.

As to the argument derived from the analogy, with regard to the benefits resulting to the community from agriculture as well as trade, the answer is, that *Elwes v. Maw* does not deny it, nor is that case any authority for saying that where an agricultural tenant has erected any machinery, or any building for the purpose of carrying on his trade as a farmer, he shall not remove them. But if the buildings be such as in the principal case, and which every farmer must necessarily have, and cannot do without, then, whether he erect them himself, or finds them on the farm when he enters upon it, he cannot remove them: such buildings cannot be said to be erected for any trading purpose, but merely for the occupation of the premises.

*Gardeners and Nurserymen.* — The rights of gardeners and nurserymen have been already incidentally touched upon, and the grounds upon which the relaxation in their favour seems to rest suggested.

In *Penton v. Robart*, 2 East. 90., Lord *Kenyon* says, "it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade. If it were otherwise, the very object of their holding would be defeated:" and see *Gibbs C. J.* in *Lee v. Risdon*, 7 Taunt. 191.; and see *Wyndham v. May*, 4 Taunt. 316., per *Heath J.*

*Strawberry Beds.*—In *Wetherell v. Howells*, Lord *Ellenborough* held, that a tenant of garden-ground could not plough up strawberry beds in full bearing at the end of his term, although he purchased them from the preceding tenant, and it was the practice to pay for them between outgoing and incoming tenant. But his Lordship observed, "the question here was, whether the thing complained of had been wrongfully and unjustly done to the prejudice of the plaintiff. The taking up strawberry roots was not necessarily an injury to the inheritance for which an action would lie; but if the defendant, in this instance, ploughed up the beds before they were exhausted and without having any reasonable object in view, he had certainly prejudiced the plaintiff's reversionary estate, and it could scarcely be doubted that he did so wrongfully and maliciously;" *Watherell v. Howells*, 1 Campb. 228. But this exemption does not extend to mere private individuals; *Wyndham v. Way*, 4 Taunt. 316.

*Hothouses and Greenhouses.*—It seems that

hothouses and greenhouses erected by nurserymen and gardeners may be taken away at the end of their term. Per Lord *Kenyon*, in *Penton v. Robart*, 2 East. 91.; but see per Lord *Ellenborough* in *Elwes v. Maw*; see also per *Dallas C.J.* in *Buckland v. Butterfield*, 4 Moore, 440.\*, and *antè*, p. 72.

\* *Blossett Serj.* cites a MS. case which shows that glasses and frames *resting on brickwork* in a nursery-ground were not removable; but why so cannot be imagined, for they were mere personal chattels, not being affixed to the freehold. See *antè*, p. 5.

## SECTION IV.

*Of the Right to remove Fixtures set up for Ornament or Convenience and domestic Use.*

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*No Authority in old Books.* — *Each Case depends on its own Facts.* — *Custom.* — *Construction.* — *Mode of Annexation.* — *Effect of Removal of Hangings, Looking-Glasses.* — *Tapestry.* — *Wainscot.* — *Chimney-pieces.* — *Beds fastened to the Ceiling.* — *Stoves, Grates, &c.* — *Pumps.* — *Doors, Hearths, &c.* — *Veranda.* — *Shrubs, &c.* — *Pillars of Brick and Mortar.* — *Grates, Stoves, &c.* — *Conservatories.*

*No Authority in old Books.* — As there is no case to be found in the old books deciding the right between landlord and tenant, to remove this class of fixtures, and as the principle, therefore, is to be inferred with reference to those cases from the decisions between other parties whose rights have been already fully treated of, or from the mere dicta of judges, it is not considered necessary to go at any length again into those cases, but simply to refer the reader to them, *antè*, pp. 30. 49., where they will be all found collected and discussed.

*Each Case depends on its own Facts.* — It must not be forgotten in any practical application of these cases, that, as said by Chief Justice *Dallas*, in *Buckland v Butterfield*, pp. 9. 90., “each case

must depend, in a great measure, upon its own peculiar facts; that the right is an exception only, and though to be fairly considered, is not to be extended;" and that, as has already been observed, *antè*, p. 8., it will be requisite to ascertain whether there be any custom or prevailing usage; what is the nature and construction of the article, its mode of annexation, and the effect of its removal\*: these will all prove useful and safe *criteria* in practice, where there is any doubt, or where any new case arises.

*Hangings.* — It has been already observed, that in Poole's case, 1 Salk. 368., Lord Holt denies the right of a tenant to remove any other description of fixtures save trade; nevertheless Lord Keeper Wright, in Squier v. Mayer, 2 Freem. 249. held that hangings nailed to the walls should be accounted as personalty, and go to the executor as against the heir.

*Looking Glasses.* — So hangings and looking glasses are only matters of ornament and furniture, and not to be taken as part of the house and freehold, but removable by the lessee of the house. Beck v. Rebow, 1 P. Wms. 94. See Elwes v. Maw, 3 East, 33., per Lord Ellenborough.

\* Whether a fixture can be removed by a tenant without substantial injury to the premises is a question proper for the jury, upon an issue whether the fixture is removable or not by law. Avery v. Cheslyn, 3 Ad. & E. 75.; 5 Nev. & M. 372.

*Tapestry, &c.* — So hangings, tapestry, and iron backs to chimneys. *Harvey v. Harvey*, 2 Stra. 1141. *Id.*

*Wainscot.* — So wainscot fixed by screws, and marble chimney-pieces. *Lawton v. Lawton*, 3 Atk. 15. *Ex parte Quincey*, per Lord *Hardwick*, *Lawton v. Salmon*, 1 H. Bl. 260. And, it would seem, a cornice fixed with screws. *Owen v. Cheslyn*, 3 Ad. & E. 75.

*Chimney-pieces.* — An outgoing tenant may remove an ornamental chimney-piece put up by himself during his tenancy, but not a chimney-piece which is not ornamental. *Leach v. Thomas*, 7 Car. & P. 385., per *Patteson*.

*Window-sashes.* — So window-sashes which are neither hung nor beaded into the frames, but merely fastened by laths nailed across the frames to prevent their falling in, for they are not fixed to the freehold. *Rex. v. Hedges*, 1 Leach, C. C. 201.; 2 East, P. C. 590. *n.*

*Beds fastened to the Ceiling.* — So beds fastened to the ceiling with ropes, or even nails. *Ex parte Quincey*, 478.

*Stoves, Cupboards, &c.* — So stoves and grates fixed into the chimney with brickwork, and cupboards supported with holdfasts. *Rex. v. St. Dunstan's*, 4 Bl. C. 686., per *Bayley J.* See *Lee v. Risdon*, 7 Taunt. 191.; *Colgraves v. Dias*, 2 B. & C. 76.; *Lyde v. Russell*, 1 B. & Al. 394. But see *Winn v. Ingilby & Hauxwell*, 5 B. & Al. 625.



In *Birch v. Dawson*, 6 Car. & P. 658., it is made a *quære* whether carpet tacked to the floor is fixed furniture.

*Pumps.* — So a pump which was attached to a perpendicular plank resting on the ground at one end, and at the other fastened to the wall by an iron pin, having a head at one end and a screw at the other, which went through the wall, *Tindal C. J.* observing, "that the article was one of domestic convenience, was slightly fixed, erected by the tenant, and might be removed entire." *Grimes v. Boweren*, 6 Bingh. 437.

These articles, being generally affixed by the tenant for his personal comfort and convenience, and being equally useful in another house, and capable of being easily disunited, by which the premises will neither be injured, nor left in a worse state than they were before, the tenant may remove.

*Doors, Hearths.* — But things affixed to the house for the purpose of completing it he cannot take away; thus doors, hearths, windows. *Poole's case*, 1 Salk. 368.

*Veranda.* — Nor a veranda placed in front of the house supported by posts fixed in the ground. *Penry v. Brown*, 2 Stark. N. P. 403.\*

\* This was an action of covenant by which the defendant undertook to repair, and keep in repair, all erections, buildings, and improvements which might be erected thereon during the term, and yield up the same in good and sufficient repair; and *Abbott J.* held that the veranda fell within the terms of the covenant.

*Pillars of Brick and Mortar.* — An outgoing tenant has no right to remove pillars of brick and mortar built on a dairy-floor to hold pans, although such pillars are not let into the ground. *Leach v. Thomas*, 7 Car. & P. 328. per *Pateson J.*

*Shrubs, &c.* — Nor can a tenant (not a gardener) remove shrubs, flowers, &c. planted by him in a garden. *Empson v. Sodden*, 4 B. & Ad. 655.

*Bookcase, &c.* — A. bequeathed his leasehold messuage, with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures and fixed furniture, to G. for life; and the household goods, furniture, plate, linen, china, books, wine, and liquors, and other properties in the messuage not being comprehended under the preceding terms, fixtures and fixed furniture, to G. absolutely. There were in the messuage looking-glasses standing on chimney-pieces and nailed to the wall, and a book-case standing on, (but not fastened to,) brackets, and screwed to the wall. It was held that G. took only a life interest in them. *Birch v. Dawson*, 4 N. & M. 22.; 2 Ad. & E. 37.; 6 Car. & P. 658.

*Conservatories.* — In *Buckland v. Butterfield*, 4 Moore, 440., it was held that pineries and conservatories were not removable by a tenant. The judgment of Chief Justice *Dallas* being a very important one, and the case itself being considered a leading authority on this class of fixtures, it is better to set it out at length.

“It was an action on the case, tried before Mr. Baron *Graham* at the last assizes at Aylesbury. The question in the cause, as far as related to the motion before the Court, was, whether a conservatory affixed to the house, in the manner specified in the report \*, was so affixed as to be an annexation to the freehold, and to make the removal of it waste? In the argument and judgment of the Court of King’s Bench, in *Elwes v. Maw*, will be found at length all that can relate to this and other cases of a similar description. It is not necessary to go into the distinctions there pointed out, as they relate to different classes of persons, or to the subject-matter itself of the inquiry. Nothing will here depend on the relation in which the parties stood to each other, or to the distinction between trade and agriculture; for this is merely the case of an ornamental building, constructed by the party for his pleasure, and the question of annexation arises on the facts reported to us; and I say the facts reported, because every case of this sort must depend on its own special and peculiar circumstances. On the one hand, it is clear that many things of an ornamental nature may be in a degree fixed, and yet during the

\* The conservatory was erected on a brick foundation fifteen inches deep, attached to the wall of the dwelling-house by cantilivers let nine inches into the wall, connected with the parlour chimney by a flue, and having two windows in common with the dwelling-house, and to a pinery erected in the garden, on a brick wall four feet deep.

term may be removed ; and, on the other hand, it is equally clear that there may be that sort of fixing or annexation which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimney-pieces, pier glasses, hangings, wainscot fixed only by screws, and the like. Of all these, it is to be observed that they are exceptions only, and therefore, though to be fairly considered, not to be extended ; and with respect to one subject in particular, namely, wainscot, Lord *Hardwicke* treated it as a very strong case. Passing over all that relates to trade and agriculture, as not being connected with the present subject, it will be only necessary to advert, as bearing upon it, to the doctrine of Lord *Kenyon*, in *Penton v. Robart*, referred to at the bar. The case itself was that of a building for the purpose of trade, and consequently standing upon a different ground from the present ; but it has been cited for the dictum of Lord *Kenyon*, which seems to treat of greenhouses and hothouses erected by great gardeners and nurserymen as not to be considered as annexed to the freehold. Even if

the law were so, which it is not necessary to examine, still, for obvious reasons, such a case would not be similar to the present; but in *Elwes v. Maw*, speaking of this dictum, Lord *Ellenborough* said, "There exists no decided case, and, I believe, no recognised opinion or practice, on either side of Westminster Hall, to warrant such an extension." Allowing, then, that matters of ornament may or may not be removable, and that whether so or not must depend on the particular case, we are of opinion that no case has ever extended the right to remove, nearly so far as it would be extended, if such right were to be established in the present instance, under the facts of the report, to which it will be sufficient to refer; and therefore we agree with the learned judge in thinking that the building in question must be considered as annexed to the freehold, and that, consequently, the removal of it would be waste."

Any injury, however, which would occur in removing fixtures, must be made good by the party severing, and he must leave the premises in all respects as he found them, whether the fixtures be set up for trade or domestic purposes. See *Foley & Addenbrooke*, 13 M. & W. 199.

## CHAPTER V.

- SECT. I. *Of the Sale and Transfer of Fixtures.*  
 SECT. II. *Of the Right to Fixtures between Vendor and Vendee.*  
 SECT. III. *Of the Statute of Frauds.*  
 SECT. IV. *Stamps on Agreements relative to Fixtures.*  
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 SECT. VII. *Of the Right to Fixtures as between a Bankrupt and his Assignees ; and other Parties.*

## SECTION I.

*Of the Sale and Transfer of Fixtures.*


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*Express Contract between Lessor and Lessee, with reference to Covenant to repair. — Veranda. — Where erected during a prior Lease. — Salt Springs. — Where Landlord covenants to take Fixtures at a Valuation. — Where he agrees that Fixtures should be valued at the End of the Term. — Parol Agreement as to the Removal of Fixtures. — Tenant's Right on Renewal of Lease. — Tenant's Interest when Fixtures demised with House. — What included in Covenant to repair. — Millstone, Furnaces, Fire Engines, &c. — Tenant's Right on Judgment being signed, with Stay of Execution. — Effect of Acceptance of Demise. — Forfeiture.*

*Express Contract. —* HITHERTO the law of fixtures has been considered with reference to those

cases where there was no express stipulation by which the rights of the parties had been previously agreed upon. It remains, therefore, to make a few observations on those cases where there is an express agreement between the parties.\*

It will be observed that it is important to make the question of fixtures a matter of agreement, for they are considered so much an integral part of the premises, that, upon an agreement for a lease, &c., if no mention be made of the fixtures in the house, it seems they would be considered as thrown into the bargain, and a compensation for their use included in the rent of the premises. *Colegrave v. Dias Santos*, 2 B. & C. 76. ; *Thresher v. E. London Waterworks Co.*, 2 B. & C. 608.

In cases where a contract does exist, the construction of the contract as regards fixtures will of course much depend upon the terms of the agreement.

It is proposed to consider this branch of the subject with reference to contracts between lessor and lessee, vendor and vendee, mortgagor and mortgagee, heir and devisee, bankrupt and assignee, and other parties.

#### LESSOR AND LESSEE.

*With Reference to a Covenant to repair.*—A te-

\* *Quære*, Whether such a stipulation might not be implied from the custom of a particular district? See *Wigglesworth v. Dallison*, 1 Dougl. 201. ; *Id.* 207. ; and see S. C. 1 Leading Cases, *et notas*.

nant covenanted to repair and keep in repair the demised messuage, tenement, and premises, and all erections and buildings then erected and built, and also all erections and buildings which might thereafter be erected and built in and upon the said premises. The defendant erected, during his term, certain fixtures for the purposes of his trade and manufacture, and these buildings he removed and carried away; whereupon the plaintiff brought an action of covenant, and the question was, whether they came within the terms of the covenant? and the Court held that they were comprehended in the terms of the covenant, and that the tenant could not remove them. *Naylor v. Collinge*, 1 Taunt. 19.

*Veranda*.—So in a case where there was a similar covenant, the tenant was precluded from removing a veranda which was fixed with posts in the ground. *Penry v. Brown*, 2 Stark. N. P. 403.

*When erected during a prior Lease*.—So neither may a tenant under a subsequent lease of the same lands, tenements, or buildings, with a general covenant to repair, remove fixtures erected before the commencement of such lease, and during the time he held the premises under a previous tenancy, even although such things might have been removable during the previous lease. *Thresher v. East London Waterworks Comp.*, 2 B. & C. 208.

*Salt Springs*.—The plaintiff demised salt springs



to the defendant, who was to erect salt works on the premises, and pay a rent in proportion to the number of works erected; the defendant covenanted to leave the works at the end of the term in good repair. Held, that iron salt pans placed by the defendant on a frame of brick, and used in the boiling of salt, were parcel of such works, and that the defendant was not entitled to remove them. *Mansfield (Earl) v. Blackbourne*, 8 Scott, 720. ; 6 Bing. N. C. 427.

*Where Landlord covenants to take Fixtures at a Valuation.*—If a landlord be entitled to fixtures on paying for them, this is a condition precedent, which he must perform.

Therefore, where a lease contains a covenant that the fixtures should be valued to the landlord at the end of the tenancy, the tenant having become bankrupt, the landlord, on the premises being delivered up to him, refused to pay the amount of the valuation of the fixtures to the assignees. It was held they might maintain trover against him for the amount of the fixtures. *Fairburn v. Eastwood*, 6 M. & W. 679.

*Where Landlord agreed that Fixtures should be valued at End of Lease.*—Where a colliery, with all the machinery and implements necessary for working it, were leased for years, with a proviso for re-entry by the landlord for nonpayment of rent; and a covenant by the lessee, at the expiration or sooner determination of the demise, to

deliver up the machinery and implements, in an inventory annexed to the lease, which were to be revalued three months before the expiration of the demise. The landlord had recovered judgment in ejectment in Trinity Term for a forfeiture by reason of the nonpayment of rent, but did not execute the writ of possession until the 8th of November, and the tenant committed an act of bankruptcy the next day:—Held, that the landlord was entitled to take possession of all the machinery and implements (some of which had been brought on the premises by the tenant during the term), though no previous valuation had been made. *Storer v. Hunter*, 3 B. & C. 368.; and see *Clark v. Crounshaw*, 3 B. & Ad. 804.; *Horn v. Baker*, 9 East, 215; *Fairburn v. Eastwood*, 6 M. & W. 679.

*Parol Agreement for the Removal of Fixtures.*—There was a covenant in a lease to sustain and keep in repair all erections and improvements which, during the term demised, should be made or set upon the premises. The lessee assigned his interest, and the assignee had the consent of the lessor to erect a greenhouse, giving him permission to take it down and carry it away at the end of the term. The lessor died. The assignee, when his term was out, took away the greenhouse, and the lessor's executor sued the original lessee for breach of covenant in not sustaining and keeping up the said erection:—Held, that the action would

lie, and that the parol consent of the lessor to the removal of the greenhouse, if it should be erected, was no answer to a breach of the conditions of an instrument under seal. *West v. Blakeway*, 9 D. P. C. 846., 5 Juer. 630.\*

*Tenant's Right on Renewal of Lease.*—If a tenant at the close of his term renew his lease and acquire a fresh interest in the same premises, he should take care to reserve his right to remove these fixtures which he had under the old tenancy a right to sever. For by entering into such new engagements without express reservation of the right of removing his fixtures, and without detaching them from the premises during the first tenancy, the tenant may sometimes lose his property in them altogether. *Fitzherbert v. Shaw*, 1 H. Bl. 258.; *Thresher v. East London Waterworks Company*, 2 B. & C. 608., 4 D. & R. 62. See *Penton v. Robart*, and see also *Dean v. Al-lalley*, 3 Esp. N. P. 12., per Lord *Kenyon*.

*Tenant's Interest when Fixtures demised with House.*—When a house is demised together with the fixtures, the tenant's interest in them is similar to that which he enjoys in respect of trees, and if he sever them, the right of possession im-

\* *Semble*. It would be otherwise if the lessor gave his command to remove the greenhouse at the very time it was removed. *West v. Blakeway*, *supra*.

It was left to the jury, according to the terms of the covenant, whether the greenhouse was an erection and improvement? Held correct.—*Id.*

mediately reverts in the landlord, who may bring trover for them. *Farrant v. Thompson*, 5 B. & A. 826.

It must be recollected that there is a distinction in those cases, in which a tenant, on entering upon the demised premises, purchases the fixtures from his landlord, and those, where he erects them himself, as to the right of removal: in the former case it arises out of the contract; in the latter it is conferred by the law.

*What included in Covenant to leave in repair.* — A covenant to leave at the end of the term a water-mill with all fixtures, fastenings, and improvements set up, &c. during the term, in good condition, &c., includes a new millstone, although the custom of the country justified its removal. *Martyr v. Bradley*, 2 M. & Scott, 25., 9 Bingh. 24.; and see *Hare v. Horton*, 5 B. & Ad. 715.

There is a very important case on this branch of the law of fixtures, which has been very recently decided in the Court of Exchequer, from which, the nature and description of those fixtures that a tenant will be permitted to remove, under a covenant in his lease with reference thereto, may be collected.

*Furnaces, Fire-engines, &c.* — It is the case of *Foley et al. v. Addenbrooke et al.*, 13 M. & W. 174., and was in the form of an action of covenant, tried before Mr. Justice *Williams* at Stafford, when a verdict was taken for the plaintiffs,

subject to the opinion of the Court on a case stated by a gentleman at the bar.

The action was brought by the plaintiffs, in the character of heirs, against the defendants, in that of assignees, for the breach of, amongst others, a certain covenant contained in a certain indenture of lease, in the following words:—"That the said J. A. Addenbrooke, his executors or assigns, should and would, from time to time and at all times during the demise, well and sufficiently repair, amend, maintain, scour, cleanse, preserve, and keep in good, sufficient, and tenantable order and repair, all the gates, rails, stiles, hedges, ditches, mounds, and fences of and belonging to the said thereby demised lands and premises, and the furnace and furnaces, fire-engine, ironworks, dwelling-houses, and other erections and buildings to be erected and built by the said J. A. Addenbrooke, his heirs, executors, administrators, or assigns, on the said demised lands and premises, he and they being allowed to get clay (other than and except fire-clay) from time to time upon the said premises, if there to be found, for making of bricks, tiles, and other articles for erecting, building, altering, and repairing the said furnace and furnaces, fire-engine, and other erections and buildings, or otherwise for the use of the works to be carried on by the said J. A. Addenbrooke, his executors, administrators, or assigns, and to be used on the premises only; and the said furnace

and furnaces, fire-engine, ironworks, dwelling-houses, and all other erections, buildings, improvements, and alterations to be hereafter erected, built, or set up, except the ironworks, castings, railways, gins, wimseys, machines, and the moveable implements and materials used in or about the said furnaces, fire-engine, ironworks, stone-pits, and premises so repaired, amended, and kept in repair as aforesaid, should and would, at the expiration or other sooner determination of the said lease, quit, leave, surrender, and yield up into the hands and quiet possession of the said lessors, without any molestation, hindrance, or interruption whatsoever." Upon this the plaintiffs assigned a breach in the words of the covenant,—that the defendants did not repair nor leave in repair at the end of the lease, but, on the contrary, part of the furnaces, &c., being other than the ironwork, &c., was by the defendants wrongfully pulled down and removed, and the furnaces, &c., being other than the ironwork, &c., were suffered to be and continue, and at the expiration of the lease were left, in bad order and condition for want of repair.

Besides the two furnaces already mentioned, the defendants also built very extensive ironworks, consisting of casting-houses, and a forge and mill, together with refineries, furnaces, warehouses, sheds, and buildings necessary and requisite for carrying on the iron trade; and they also built

necessary houses for workmen to reside in, to carry on the intended ironworks.

The indenture of lease contained a proviso, that at the end, expiration, or other sooner determination of the demise, the lessors and their respective heirs should, upon their giving six months' previous notice in writing of their intention, whether they would purchase or not, to the said J. A. Addenbrooke, his executors, &c., have an option of purchasing the several iron-castings, railways, gins, wimseys, boilers, machines, and movable implements and materials then in use, or being in or about the said furnaces, fire-engine, ironworks, stone-pits, lands, and premises, at a price to be determined in a manner therein mentioned; and, in the event of their neglecting to avail themselves of their option in that behalf, then it should and might be lawful to and for the said J. A. Addenbrooke, his executors, administrators, and assigns, to remove and carry away, for his and their own use and benefit, all and every the said several iron castings, railways, gins\*, wimseys†, boilers, machines, and movable implements and materials then in use, or being in or about the said furnaces, fire-engine, ironworks, stone-pits, and premises.

\* A gin is a windlass fixed in the ground, and worked by a horse, for the purpose of drawing minerals from out of a mine.

† A wimsey is a machine of a similar kind, used for the same purpose, but worked by a steam-engine.

The plaintiffs did not avail themselves of the proviso, nor give to the defendants any notice of purchasing the above-mentioned articles; and the defendants, before the expiration of their lease, disannexed from the freehold and took away the several articles hereinafter enumerated and particularly described (and in so doing injured and damaged the said furnaces and ironworks); viz.

First, a blast steam-engine or fire-engine, forming, together with its boilers, regulators, and hot-air apparatus, one mechanical contrivance for blowing the said furnaces by means of a hot blast.

The boilers of the engine were made of wrought iron, and rested on foundations of brickwork, called the boiler seats, and were built in and surrounded by flues of brickwork, lined with fire-brick, proceeding from the boiler grates, for the purpose of conveying the flame underneath and round the boilers. The surrounding and superincumbent brickwork of the flues held the boilers firmly fixed in their seats, so that they could not be removed without taking away the flues. The boiler grates consisted of bearers of cast iron, set in brickwork, with cross-bars and a door-frame, and a door also of cast-iron.

The defendants took away the boilers and the grates, and pulled down the flues, and took away part of the bricks from the seats of the boilers.

A pipe called the steam-pipe proceeded from



the boilers to the steam cylinder of the engine, connecting the boiler with the engine.

The blast engine was erected in a separate building called the engine-house, and consisted of a cast-iron cylinder called the steam cylinder, resting upon a basement of solid brickwork, to which it was fixed by rods of wrought iron, screwed at one end into the bottom plate of the said cylinder, and at the other into plates of cast iron let into the bottom of the brickwork on which the cylinder rested. From the top of the steam cylinder proceeded a rod of iron called the piston-rod, which, by the action of the steam in the steam cylinder, worked the beam of the engine; this latter was supported by an erection of brick-work, called the lever-wall, on the top of which were certain carriages of cast-iron, called the beam-carriages, on which the beam of the engine worked, which were fixed to the lever-wall by similar rods of wrought iron, screwed at one end into the bottom plate of the beam-carriages, and at the other into holding-down plates let into the lever-wall at the bottom.

The beam carriages were also attached, by means of screws, to two large beams of timber called the spring-beams, placed parallel to the beam of the engine, and supported by the lever-wall in the centre, and by the external walls of the engine-house at their extremities; the parallel-motion apparatus was also screwed to the spring-beams.

A rod proceeding from the other end of the beam of the engine worked another cylinder, called the blowing or blast cylinder, situate on the opposite side of the lever-wall to the steam cylinder. This also was supported by a similar basement of brickwork, to which it was fixed by means of holding-down rods and holding-down plates, in precisely the same way as the steam cylinder. The engine beam had been formerly made of wood, but, at the time of the removal of the engine by the defendants, was of cast-iron. The rest of the engine consisted of the air-pump, condenser, machinery, and gear of the engine.

The term "steam-engine" or "fire-engine" is applicable to the whole structure, including the brick supports of the cylinder, the lever-wall, and the spring-beams, as well as to the cylinders, gear, and machinery of the engine. In this sense, the spring-beams were the timber parts of the engine, and the lever-wall and the supports of the cylinders the brick parts of the engine, and the residue the metallic parts of the engine; but the brickwork and timber were merely supports to the mechanical parts of the engine, which were made of metal exclusively. The metallic parts of the said steam-engine were made of cast-iron and wrought-iron, with some small portion of brass, and the cast-iron parts would be properly described as the castings of the engine, and those made of wrought iron as the iron-work of the engine. These terms

are correctly applied to all articles made of cast iron or wrought iron respectively, whether forming parts of machinery, or attached to buildings, or loose; and castings means made of cast-iron, and iron-work means wrought iron. By taking out the rods which affix the cylinders and the beam-carriages to the holding-down plates, and by taking out the screws which fix the beam carriages and the parallel motion to the spring-beam, the whole of the mechanical part of the engine might be disattached without injury to the structure. But the holding-down plates, being let into the brickwork, could not be removed without injury to the brickwork, and the spring-beams could not be removed without damage to the external walls and floors of the engine-house. The defendants took out the holding-down plates, and removed the two cylinders, the beam carriage, and the beam of the engine, and all the gear, machinery, and metallic parts of the engine; they also took away the spring-beams. In detaching the cylinders and beam-carriages, they disturbed and injured the brickwork of the lever-wall, and pulled down a portion of the external wall of the engine-house in removing the spring-beams, and getting out the blowing cylinder and the engine-beam.

The blast furnaces, refineries, cupola, puddling furnaces, and mill furnaces, are all of them erections requisite and necessary for the iron trade,

and the making of iron, and the smelting of iron ore, and the manufacturing of iron; and iron-works would not be complete, and the progress of manufacturing iron could not be carried on, without them.

The forge-engine and mill-engine, the foundation of the forge-hammer and shears, and frames of the mill-wheels, and frames and bed-plates of the rolls, the cast-iron columns supporting the roof of the mill and the gasometer; that all these buildings had foundations let into the ground, and were erected as conveniences to the defendant's ironwork.

The whole of the above buildings were removed by the defendants, and the question for the opinion of the court was, whether the defendants are entitled to remove all or any, and if any, which, of the articles enumerated and described?

*Pollock* C.B. delivered the judgment of the court. After dealing with the other questions, his Lordship said:—

“With respect to the third breach, it appears to us that it is hardly necessary to do more than advert to the terms of the covenant upon which this arises. There is a covenant to repair, excepting the iron-work castings, railways, gins, wimseys, machines, and movable implements and materials used in or about the said furnaces, fire-engines, ironworks, stove-pits, and premises. And there is a power on the part of

the lessors, or those who represent them, on notice given at a certain period before the expiration of the lease, to purchase those articles. It appears that they declined purchasing them, in consequence of which the defendants stopped the works, and removed a very large number of the articles; and the question is, what damages they are to pay in respect of the articles, some of which they had a clear right to remove, others which they had no right to remove. The rule which the court thinks the correct one to act upon is this, — that whatever was in the nature of a machine, or part of a machine, as iron-works, or iron-castings, or railways, gins, or movable implements or materials, the defendants had a right to remove; that whatever was in the nature of building or support of buildings, although made of iron, the defendants had not a right to remove; that, with respect to damage to the brickwork, which constitutes a considerable portion of the claim made by the plaintiff, the defendants were not bound to restore the brickwork in a perfect state, as if the article that it was intended to protect, or support, or cover, were there; it was sufficient for the defendants to exercise their right to remove what the lease gave them authority to remove, and, in doing so, to remove the brickwork, and to leave it in such a state as would be most useful and beneficial to the lessors, or to those who might next take the premises. Now, subject to

that rule, perhaps it may be necessary just shortly to mention the items, and dispose of them according to that rule."

"The first is that of boilers; clearly, the plaintiffs have no right to retain them. So of the boiler grates, and the castings and ironwork of the engine and regulator, and of the spring beams."

"The hot-air apparatus, the defendant had a right to take. We think the defendants entitled to remove them. The next is, the removal of the hoops, bearers, and brickstuffs; those articles are not ironwork in the nature of machines or implements, but are ironwork substituted for additional brickwork, with a view to give additional, and probably necessary strength to the furnace, which the defendants had no right to remove or to deteriorate."

"The next is the cupola, the blast-pipes which worked it, the two refineries, and the blast-pipes which worked them. We think the defendants had a right to remove them."

"Then eleven puddling-furnaces, four mill-furnaces. Those appear to have been precisely of the same nature with the fire-engine and the other matters of iron used in the course of the work, which the defendants had a right to remove. Then the next is, the boilers of the forge-engine, the grates of the boilers, the castings and ironwork of the forge-engines, the boilers of the mill-engine, the grates of the boilers, the castings

and ironwork of the mill-engine. As to the boilers of the forge-engine and the boilers of the mill-engine, those, I observe, were already struck out before this paper was handed up to the court. We are of opinion, that all those the defendants were entitled to remove under the clauses in the lease."

"Then the removal of the plates from the shears foundation, including the plates and pins: it appears to us, the defendants had a right to remove them. Then, with respect to the holding-down pins and the bed plates, we are of opinion that the defendants were entitled to remove them. Then there is the cast-iron columns: those were columns used for the support of the building. With respect to those, we are of opinion that the columns used for the support of the building are not within the exception in the lease, and that the plaintiffs are entitled to recover damages for the removal of them. The value of the gasometer and apparatus, we think the plaintiffs are not entitled to."

*Pass by Assignment though not mentioned.* — Lease of a water-mill, with the mill-wheel and some machinery belonging thereto, granted to A. A. erected various other pieces of machinery, so as to enlarge the capacity and power of the mill, and assigned the lease to B. without mentioning in the assignment the machinery put up by himself. It was admitted that such machinery constituted trade fixtures and was removable. Held

that they passed by the assignment to B. though not mentioned. *Mount v. Bell*, Ech., East. Term, 1845.

*Tenant's Rights, on Judgment being signed with Stay of Execution.* — When the purchaser of lands, &c., having brought an ejectment against tenant from year to year, the parties entered into an agreement that judgment shall be signed for the plaintiff, with a stay of execution until a given period, the tenant cannot, in the interval, remove buildings, &c. from the premises which he had himself erected during the term, and before the action brought. *Fitzherbert v. Shaw*, 1 H. Bl.

*Effect of Acceptance of Demise.* — The acceptance of a demise of a house containing fixtures, does not raise an implied contract to pay for such fixtures. *Goff v. Harris*, 5 M. & Gr. 573.

*Forfeiture.* — Various engines and other fixtures used in mining and smelting, were standing on the premises at the date of the demise: the engines were purchased by the incoming tenant from the outgoing tenant, and were not mentioned in the general words of the demise, nor in the clause of re-entry, but the lessee covenanted to keep the "said engines" (the word "engines" never having occurred before) in good and tenantable repair, and the same in such state to yield up at the end or sooner determination of the term; and the lessor covenanted that the lessee might remove at the end of the term, or sooner,



(except as in the cases and events before mentioned, in any of which—a taking in execution being one—it was made lawful for the lessor to re-enter,) all such engines, &c. as had theretofore been erected, and all such as should, by himself, be erected for carrying on the smelting business:—Held, that upon a forfeiture of the demise by a taking in execution, the lessee had lost his right to recover any of the fixtures, and that they all belonged to the lessor, such being the intention of the parties, as collected from the covenants. *Rex v. Topping, M'Clel. & Y. 544.*

## SECTION II.

*Of the Right to Fixtures between Vendor and Vendee.*

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*Fixtures pass if not Subject of express Contract.—What passes under the Sale of a Mill cum pertinentiis.—A Windmill passes with the Land.—Constructive Annexations.—Utensils of a Brewhouse.—Ornamental Fixtures.*

THERE are other parties besides those already referred to, between whom questions in respect to the right to fixtures have not unfrequently arisen, viz. vendor and vendee; and these cases shall now form the subject of inquiry.

*If not Subject of express Contract.*—It may be premised, that upon a sale of the freehold any fixtures attached to it will pass, in the absence of any express provision to the contrary. *Hickman v. Walton*, 4 M. & W. 409., per *Parke B.* See also *Crockford v. Alexander*, 15 Ves. J. 138.; and see *Boydell v. M'Michael*, 1 Cr. M. & R. 177.; see *Wheeler v. Montefiore*, 2 Q. B. 142.; per Lord *Denman*, 1 G. & D. 493. Therefore, where a person put up to sale a freehold house and estate, but did not notice the fixtures in the particulars of sale, and afterwards executed a conveyance of the house and estate to the purchaser, and then insisted that certain fixtures removable between landlord and tenant should be taken at a valu-

ation, and having brought an action of trover for such fixtures, the Court were of opinion that they passed by the conveyance of the house and lands, and that the vendor had no right to them. *Colegrave v. Dios Santos*, 2 B. & C. 76., 3 D. & R. 255.

*What passes under the Sale of a Mill cum pertinentiis.*—A man was seised of a close on part whereof was a house, and on another part was a kiln; and also of two mills adjoining to the close; and used and occupied them all together till 1655, when he divided them, and sold the house and a part of the close, and reserved the other part and the kiln, and used them with the mill, and afterwards he sold the mill *cum pertinentiis* to the plaintiff; and whether the mill and the parts of the close in which they stood, should pass to the plaintiff, was the question. But the Court held they did not pass; for by the grant of a messuage or lands *cum pertinentiis*, any other land or thing cannot pass, though by the words *cum terris pertinentibus* it would; sed, per *Wyndham J.*, if all the matter had been found, and that the kiln was necessary for the use of the mills, and without which they were not useful, the kiln had passed as part of the mills, though not as appurtenances; as by the grant of a messuage, the conduits and water pipes shall pass as parcel. *Archer v. Bennet*, 1 Lev. 131.

*A Windmill passes with the Land.*—If land

be conveyed with a windmill affixed to it in the usual way, without any mention of the mill, it would seem to pass with the land. Thus an octagon wooden edifice, raised on a basement of brickwork, and anchored into the ground by shores and land-ties, part of the shores and the whole of the land-ties being one foot under the surface of the ground:—*Richardson J.* was of opinion, that the purchaser would be entitled to it without any mention made of it.

*Constructive Annexations.* — Things constructively annexed will also pass by a conveyance of the land or premises; thus a millstone, although severed at the time of the conveyance, and doors, windows, keys, locks, &c. See *ante*, p. 15.; *Shep. Touch.* 90.; *Liford's case*, 11 Co. 50.

*Utensils of a Brewhouse.* — It is said, however, that the fixed utensils of a brewhouse would not pass by a conveyance thereof with the appurtenances. *Exp. Quincey*, 1 Atk. 477., per Lord *Hardwicke*.

*Ornamental Fixtures.* — So likewise a covenant to settle a house and all things affixed to the freehold thereof, does not include ornamental fixtures fastened by screws and nails. *Beck v. Rebow*, 1 P. Wms. 94.

It is advisable, therefore, in a conveyance of lands, houses, &c., where it is the intention that things of a personal nature attached thereto shall not pass to expressly reserve them.

### SECTION III.

#### *Of the Statute of Frauds.*

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*Contracts for Fixtures within the Statute. — When Tenant waives his Right to remove Fixtures at Landlord's Request. — Sale of growing Wood. — Growing Crops. — Grass. — Potatoes and Turnips. — Growing Fruit.*

*Contracts within the Statute.* — CONTRACTS for the sale of fixtures being within the Statute of Frauds, should be in writing, and signed by the parties or their authorised agents.

*Where Tenant waives his Right to remove Fixtures at Landlord's Request.* — Where, however, a short time before the expiration of the lease of a house, the landlord agreed with the tenant to purchase his fixtures at a valuation, the lease expired, and the tenant having quitted possession of the premises without severing the fixtures, sent the key to the landlord. The broker appointed by the latter afterwards appraised the fixtures at more than 10*l.*, and signed the valuation : — Held, that the plaintiff having, at the defendant's request, waived his right to remove his fixtures, the matter bargained for, was not an interest in land within the 29 Car. 2. c. 3. s. 4., and that the amount ascertained by the broker might be re-

covered on *indebitatus assumpsit*, for fixtures and effects bargained and sold, without having a note, &c. in writing. *Hallen v. Rander*, 3 Tyrwh. 959., 1 Cr. M. & R. 266.

*Growing Wood*.—The sale of growing under-wood to be cut by the purchaser, confers an interest in land under the statute. *Scorell v. Boxall*, 1 Y. & J. 397.

*A.*, being the owner of trees growing upon his land, verbally agreed with *B.*, while they were standing, to sell him the timber at so much per foot. *B.* afterwards offered to sell the butts of the trees to a third person, and said he would convert the tops into building stuff. *A.* afterwards, by letter, required *B.* to pay for the timber which he, *B.*, had bought of him; *B.* wrote a letter in answer, stating that he had bought the timber, and that he bought it to be sound and good, and that it was not so:—Held, that the contract was not a contract for the sale of lands, tenements, and hereditaments, or any interest in or concerning the same, within the meaning of the 4th sect. of the Statute of Frauds, but that it was a contract for the sale of goods, &c., within the 17th sect. *Smith v. Surman*, 9 B. & C. 561., 4 M. & R. 455.

Defendants were sued for the price of some growing trees which they had purchased, cut down, and carried away; a witness proved an admission by one of them that something was due, and a promise to pay. At the time of the bar-

gain, written memoranda had been made of the transaction; but these memoranda (one of them an item in a book of accounts) being neither stamped nor signed with the names of the parties, could not be produced in evidence, and plaintiff was nonsuited:—Held, the nonsuit was proper. *Teal v. Auty*, 2 Brod. & B. 99.; S. C., 4 Moore, 542.

*Growing Crops.*—A contract for the sale of a growing crop of lands is within the statute. *Carlington v. Roots*, 2 M. & W. 248., 1 Jur. 85., Mur. & H. 14.

*Grass.*—So is growing grass of fields. *Shelton v. Livins*, 2 Tyr. 420., 2 G. & J. 411.; *Crosby v. Wadsworth*, 6 East, 602., 2 Smith, 559.

*Potatoes.*—A verbal agreement made on the 25th of September, for the sale of a growing crop of potatoes, is not a contract within the 4th sect. *Evans v. Roberts*, 5 B. & C. 829., 8 D. & R. 611.

A contract by the owner of a close cropped with potatoes, made on the 21st of November, to sell to the defendant the potatoes at so much a sack, the defendant to get them out of the ground immediately, is not a contract for any interest in land within the 4th section of the Statute of Frauds, but the same as if the potatoes, which had been growing and were to be taken up immediately, had been sold in a warehouse, whence they were to be removed by the defendant. *Parker v.*

Staniland, 11 East, 362. See *Warwick v. Bruce*, 2 M. & S. 205.

The defendant in the month of June agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at 2s. per sack, the plaintiff to have them at digging-up time (October), and to find diggers:—Held, that this was not a contract for the sale of an interest in land within the 4th section of the Statute of Frauds. *Sainsbury v. Matthews*, 4 Mee. & Wels. 343.; S. C., 8 D. & R. 611., 5 B. & C. 829.

A contract, by which the defendant was to pay for growing corn and potatoes, the stubble, and whatever long grass was in the fields; the defendant to harvest the corn and dig the potatoes, and the plaintiff to have the liberty of turning his cattle on, and to pay the tithes,—is not a contract for the sale of an interest in land, for the growing crops are mere chattels, and with regard to the grass, as the plaintiff did not part with his possession of the soil, the contract was to be construed as an agistment of the defendant's cattle by the plaintiff. *Jones v. Flint*, 2 P. & D. 594., 10 Ad. & E. 753.; see *Poulter v. Killingbreck*, 1 B. & P. 397.; and see *Waddington v. Bristow*, 2 Id. 432., and 2 N. R. 355.

*Turnips*.—But a sale of growing turnips, no time being stipulated for their removal, and the degree of their maturity not being positively found, is a sale of an interest in land, and must



be in writing. *Emmerson v. Hales*, 2 Taunt. 38.; and see *Mayfield v. Wadsley*, 3 B. & C. 357., 5 D. & R. 224.

*Growing Fruit.* — An agreement for the sale of growing fruit is an agreement for the sale of an interest in land, and if of the value of 20*l.* requires a stamp. *Rodwell v. Phillips*, 9 M. & W. 501., 1 D. N. S. 885.

## SECTION IV.

*Stamps on Agreements relative to Fixtures.*

THE duty on fixtures sold by auction was abolished in the present session of parliament.

Agreements for the sale and purchase of fixtures amounting to 20*l.*, require a stamp. *Parke J.* 2 Sc. 249. ; *Parke B.* 2 Cr. M. & R. 616. ; 1 Cr. M. & R. 275. *Chanter v. Dickinson*, 2 D. N. S. 838. ; 6 Sc. N. R. 182. The general Stamp Act, 55 *G.* 3. c. 184., requires that the number of words contained in any schedule or inventory which is put or indorsed upon, or annexed to a deed or agreement, must be calculated as part of the instrument, and the duty to be ascertained accordingly. See *Luke v. Ashwell*, 3 East, 325. If, however, such schedule, &c. be referred to, in, or by, and intended to be used or given in evidence as part of, or as material to any agreement, lease, tack, bond, or other instrument, &c., it being separate and distinct from, and not indorsed on, or annexed to such agreement, &c., it requires a duty of 1*l.* 5*s.*, and a further progressive duty on the increase of the number of words after a certain limit. But see the recent enactment of 7 Vic. c. 71., reducing the duty on agreements, &c., chargeable with the duty of 1*l.*, to 2*s.* 6*d.*

## SECTION V.

*Of the Right to Fixtures between Mortgagor and Mortgagee.*

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*Fixtures, if not excepted.—Windmill passes with the Land.*  
—*Coppers, &c., when set up after Mortgage, pass to Assignee of Bankrupt, though mentioned in Deed.—Do not require Transfer of Possession.—Fraud.*

*Fixtures pass by, if not excepted.—*THERE is no doubt that, by a mortgage, fixtures annexed to the freehold will pass, unless there be some words in the deed to exclude them. *Langstaff v. Meagoe*, 2 B. & Ad. 170. ; 4 N. & M. 213., per *Parke B.* in *Hitchman v. Walton*, 4 M. & W. 416.

The lessee of a house, containing fixtures which he had purchased, executed an assignment of the premises by way of mortgage, not mentioning the fixtures. He afterwards assigned the premises and all his estate and effects to trustees; the trustees being in treaty for a sale of the fixtures, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused on demand to deliver up the fixtures. The trustees brought trover. Held, that they could not recover for the fixtures. *Langstaff v. Meagoe*, *suprà*.

*Windmill passes with the Land.*—On a mortgage of land, the mortgagee has a right to a windmill fixed to the land. *Steward v. Lombe*, 1 B. & B. 506.\* Per *Richardson J.*

*Coppers, &c.*—Sir *Thomas Parker*, Ch. B., says that coppers and fixtures would pass by a mortgage of the freehold. *Ryall (assignee, &c.) v. Rolle (executor, &c.)*, 1 Atk. 165.

*Where set up after Mortgage.*—Fixtures which are by law removable between landlord and tenant, as well as on the principle of the benefit of trade, part whereof were erected before a mortgage and part afterwards, were held to pass to the mortgagee and not to the assignees of the bankrupt mortgagor under the 72 sect. of the 6 Geo. 4. c. 16. *Exp. Raynal*. 2 Mont. D. & De G. 443. But see *Exp. King*, 1 Id. 119.

*Pass to Assignee of Bankrupt though mentioned in Deed.*—But fixtures have been held to pass to assignees of bankrupt, although they formed the subject of express covenant in the mortgage deed. Thus when, in January 1797, several persons carried on business in partnership as calico-printers, and in the same month certain premises on which their works were principally carried on, were conveyed to one of the partners in fee, the conveyance men-

\* In the deed there was a covenant for the absolute sale of the windmill.

tioned the premises to consist, besides land, of dwelling-houses, machine-house, and other buildings and erections, and stated them to be then in the possession of the partner to whom they were conveyed, and another partner. Various buildings and machines were afterwards, from time to time, erected on the premises by the firm, for the purpose of extending the works. The whole was firmly fixed to the freehold, and stood on that part of the land which was conveyed to one of the partners in 1797, but the part in question could be removed without material injury to the buildings. In the different stock-takings of the firm, the land and buildings were always valued and classed separately from the machinery and fixtures. In the part of the country where the premises were situated, machinery of this description was constantly bought and sold distinctly from the freehold. The freehold in the premises having been subsequently conveyed to two of the partners, they, in 1828, mortgaged them to the plaintiff's wife, under the description of "all the messuages, dwelling-houses, lands, and buildings therein mentioned; and also all that and those the steam-engine, mill-gearing, heavy gear to millwright work, fixed machinery, and other matters and things, &c., then standing and being in, and upon the thereby demised buildings, works, and premises, which in any manner constituted fixtures and appendages to the freehold

of the same, or any part thereof." All the machinery, fixtures, &c. appeared to have been in the reputed ownership of the partners who carried on the works until 1831, when they became bankrupt, and the defendants were appointed their assignees. The plaintiff, who was the husband of the mortgagee, had inspected statements of the affairs of the partners, which treated the machinery as not included in the mortgage, and had made no objections to such statements. In the month of April, 1831, the assignees sold all the machinery and fixtures, with the exception of two steam-engines, two water-wheels, an iron flooring, and other small articles, and the greater part of them was removed by the purchasers. The articles claimed by the mortgagee were all firmly fixed to the freehold, in such a manner, however, that they might easily be removed without material injury to themselves or to the buildings. Held, that the machinery did not belong to inheritance, but was part of the personal estate of the bankrupts, and that it passed to the assignees, and that the machinery in question was not intended to pass, and did not pass to the mortgagee, under the mortgage deed. *Trappes v. Harter*, 2 C. & M. 153. 3 Tyr. 604.

*Do not require Transfer of Possession.* — A transfer of property in fixtures, by way of mortgage, requires *no* transfer of possession to make it good, as against other creditors. See *Steward*<sup>1</sup>

*v. Loombe*, 1 B. & B. 506., *Place v. Fagg*, 4 M. & R. 277.; *Trapps v. Harter*, *antè*, p. 123. See *Vendor v. Vendee*, *ante*, particularly *Exparte Quincey*.

*Fraud.* — The continuing possession of fixtures by a mortgagor, after a mortgage of the land to which they are annexed, cannot be treated as a badge of fraud. *Steward v. Loombe*, *suprà*; *Ryall v. Rolle*, 1 Atk. 175.; *Minshall v. Lloyd*, 2 M. & W. 457.; *Coombs v. Beaumont*, 2 B. & Ad. 72.

SECTION VI.

*Of the Right to Fixtures between Heir and Devisee.*

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*What may be devised.—Rights of Devisee against Executor.*  
*—Fire Engines.—A Devise of a Messuage and Fixtures*  
*for Life does not include Chimney-pieces, &c. nailed to the*  
*Wall.—Whether ornamental Furniture passes under a*  
*Devise of a House.—Heirlooms.—Emblems.*

*What may be devised.* — A TESTATOR may devise such fixtures as are severable from the freehold, and which would go to his personal representative, to the exclusion of the heir. But if the estate itself be not devisable, the things which are attached to it will not pass under a devise of them; and, therefore, it has been held, that if a tenant for life, or in tail, devise fixtures, his devise is void. *Ship. Touch.* 469, 470.; *Herlakenden's Case*, 4 Co. 62.

It would seem, however, that where a testator had a devisable interest, a bequest of a house would pass the fixtures, although not expressly named. *Id.*, and see *Colgrave v. Dias Santos*, 2 B. & C. 80.; 6 Mod. 187.; unless, indeed, they could be considered personal estate, and would therefore go to the executor.



*Rights of Devisee against Executor.* — The rights of the devisee of lands against executor of the testator would seem, on principle, to be the same as those of the heir, in whose place the devisee stands. 2 Leading Cas. 121.

*Fire Engines.* — Fire engine would pass under a bequest of things in the nature of personal estate. *Stuart v. Bute* (Marquis of), 3 Ves. 212.; 11 Id. 657.

*Devise of a Messuage and Fixtures for Life does not include Chimney-pieces, &c. nailed to the Wall.* — A. bequeathed his leasehold messuage, with the grates, coppers, stoves, locks, bolts, keys, bells, and other fixtures and fixed furniture, to V. for life, and the household goods, furniture, plate, china, linen, books, wine, and liquors, and other properties (the messuage not being comprehended under the preceding terms fixtures and fixed furniture) to V., absolutely. There were in the messuage looking-glasses, standing on chimney-pieces and nailed to the wall, and a book-case standing on (but not fastened to) brackets, and screwed to the wall. It was held, that V. took only a life interest in these. *Birch v. Dawson*, 4 Nev. & M. 22.; 2 Ad. & E. 37.; 6 Car. & P. 658.

*Whether ornamental Furniture passes under a devise of a House.* — If the devise be of a house and all things fixed to the freehold of the house, it is doubtful whether mere ornamental furniture,

such as would be removable between landlord and tenant, would pass to the devisee, such things going to the executor.

Lord Chancellor *King* held, that under the word "furniture," in a will, marble slabs or chimney-pieces fixed in a house of which the testator was seised in fee simple, did not pass to the devisee. *Allen v. Allen*, Mosely, 112.

The safest course to adopt in all cases is, to enumerate the articles in the will which it is the intention of the testator to bequeath.

*Heirlooms.*—If the chattels which are intended to go as heirlooms, are merely subject to the same limitations as the real estate, limited in strict settlement, they will vest absolutely in the first tenant in tail, though he should die within an hour after his birth, and will go to his personal representative; so there will be a separation between the two properties, as the real estate in that event passes over to the remainderman. *Foley v. Burnell*, 1 Brow. Ch. R. 274.; *Vaugh v. Burslem*, 3 Id. 101.; *Newcastle (Duke) v. Lincoln*, 12 Ves. Sen. 218.; *Carr v. Errol*, 14., Id. 478.; *St. Alban's (Duke) v. Deerhurst*, 5 Mad. 232.; *Tollemache v. Coventry*, 2 Cl. & Fin. 611.; *Mackworth v. Hindman*, 2 Keen, 658. It is usual, therefore, after subjecting the chattels to the same limitations as the freehold, which they are to accompany as heirlooms, to add a declaration, that they shall not vest absolutely in the tenant in

tail until twenty-one, or death under that age leaving issue. 1 Pow. Dev. by Jarman, 716. 730. 732.; 2 Id. 642.

*Emblements.*—Although, in general, the right to emblements belongs to the personal representative as against the heir of the deceased owner of the inheritance, yet, if the land be expressly devised, the growing crops pass to the devisee; in which case it is presumed to have been the intention of the testator to pass not only the land itself, but that which appertained to it. 1 Roll. R. 89. 727.; Spencer's Case, Winch. 51., Anon. Cro. El. 61., recognised in *Knevet v. Pool*, Id. 461.; Bull. N. P. 34. n., see *Cox v. Godsalve*, 6 East, 604. n.; 8 Id. 339.; and see Co. Lit. 55. b. note, 365. by Hargrave; Gilb. Ev. 208.; Com. Dig. tit. Bien's and other Digests. "Emblements," "Executors," &c.

## SECTION VII.

*Of the Right to Fixtures as between a Bankrupt and his Assignees.*

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*Provisions of the Bankrupt Act. — How it differs from 21 Jac. 1. c. 19. — What within the Statute. — Distinctions between Things affixed and those not. — Tenant's Fixtures. — Goods and Chattels. — Possession, Order, and Disposition. — Trade Fixtures, Goods, and Chattels. — Possession, Order, and Disposition. — What Assignees entitled to. — Equitable Mortgage Custom. — Time of Removal by Assignee.*

QUESTIONS have not unfrequently arisen as to the right of the assignees of a bankrupt to remove fixtures in the apparent ownership of such bankrupt, under the 72d sect. of the 6 G. 4. c. 16., and this inquiry will form the subject of the present section.

*Provisions of the Bankrupt Act.* — By the stat. 6 G. 4. c. 16. s. 72. it is provided, that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he is reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same

for the benefit of the creditors under the commission.

*How it differs from 21 Jac. 1. c. 19.*—It will be perceived that this enactment is similar to that in the repealed statute 21 Jac. 1. c. 19. s. 11., except that here the words are “*or disposition* ;” in the statute of James, they were “*and disposition* ;” here the words are “*whereof he was reputed owner, or whereof he had taken upon himself the sale,*” &c. : in the statute of James they were “*whereof they shall be reputed owners, and take upon them the sale,*” &c. And having now referred to the difference between these two enactments, the next step will be, to notice the cases that have been decided upon the subject. The earliest in the book have, of course, turned upon the statute of James, but they will be found equally applicable under the more recent statute.

*What within Statute.*—To bring a case within the meaning of the above section of the Bankrupt Act, it will be manifest the property must be goods and chattels ; therefore the possession of land or things fixed to the freehold, is not within the meaning of the statute. *Ryall v. Rolle*, 1 Atk. 165. ; 1 Ves. 348.

*Personal Chattels.*—The right of assignees to such chattels as are in the order and disposition of the bankrupt at the time of the bankruptcy, only extends to personal chattels, such as pass by transfer and delivery, and the value of which is

not deteriorated by removal. Per Sir *John Cross* in *Exp. King*, 4 Jur. 510.

*Distinction between those Things affixed and those not.* — A., B., and C., partners and distillers, occupied certain premises leased to A. and another, and used in common in the trade, the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C. and one J. should carry on the business on the premises; and by deed between the two last and A. it was covenanted and agreed that A. should withdraw from the business, and permit C. and J. to use, occupy, and enjoy the distil-house and premises, paying the reserved rent, &c.; and the several stills, vats, and utensils of trade, specified and numbered in a schedule annexed, in consideration of an annuity to be paid by C. and J. to A. and his wife, and the survivor; with liberty for C. and J., on the decease of A. and his wife, to purchase the distil-house and the premises for the remainder of A.'s term, and the stills, vats, &c. mentioned in the schedule; and C. and J. covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time if not purchased; and there was a proviso for re-entry, if the annuity were two months in arrear. Under this C. and J. took possession of the premises, with the stills, vats,

and utensils, and carried on the business as before, and made payments of the annuity, which afterwards fell in arrear more than two months; but A.'s widow and executrix, who survived him, did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and J., who continued in possession of the stills, vats, and utensils on the premises. On a question whether such stills, vats, and utensils, so continuing in possession of C. and J. the new partners, and used by them in their trade in the same manner as they had been by the former partners, of whom A., the owner, was one, passed under the stat. 21 Jac. 1. c. 19. ss. 10. and 11. to the assignees of C. and J., as being in the possession, order, and disposition of the bankrupt at the time of their bankruptcy, as reputed owners; and nothing appearing to the world to rebut the presumption of true ownership in the bankrupts, arising out of their possession and reputed ownership (of which reputed ownership the jury are to judge from the circumstances): Held, 1st, That the stills which were fixed to the freehold did not pass to the assignees under the words "goods and chattels" in the statute: 2dly, That the vats, &c., which were not so fixed did pass to the assignees, as being left by the true owner in the possession, order, and disposition (as it appeared to the eye of the world) of the bankrupts as reputed owners: 3dly, That the case would have admitted of a different con-

sideration, if there had been a usage in the trade for the utensils of it to be let out to the traders, as, that might have rebutted the presumption of ownership, arising from the possession and apparent order and disposition of them. *Horn v. Baker*, 9 East, 215.; see *Sinclair v. Stevenson*, 2 Bingh. 514.; in which, however, *Horn v. Baker* does not seem to have been noticed.

L. took a lease of a mill and iron-forge, and bought the fixed and movable implements, &c.; but it was agreed that they should be delivered up at the end or other determination of the term, at a valuation, if the lessors should give fifteen months' notice of their desire to have them. L. afterwards conveyed all his interest in the premises, implements, &c. to a creditor in trust, if default should be made by L. in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds, re-assigning the residue; and if the lessor should require a re-sale of the implements, &c., the proceeds of such re-sale were to go in discharge of the debt if unsatisfied. L. made default, and subsequently became bankrupt; after which, and during the term, the creditor, who had not before interfered, entered upon the property. Held, on trespass brought by the assignee, that L. had at the time of his bankruptcy the reputed ownership of the movable goods, but not of the fixtures. *Clark v. Crownshaw*, 3 B. & Ad. 804.



In these cases, the Court draws the distinction between those things which are affixed to the freehold and those which are not.

*Steam-Engine affixed to the Freehold.* — A steam-engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, was held not to pass to the assignees of his tenant on his bankruptcy, for it does not come within the description of "goods and chattels" in 6 G. 4. c. 16. s. 72.; nor had the bankrupt the actual or apparent ownership. *Coombes v. Beaumont*, 5 B. & Ad. 72., S. C. 2 Nev. & Man. 235.; see *Boydell v. M'Michael*, 1 Cr. M. & R. 177.

In *Coombes v. Beaumont*, Mr. Justice *Park* observed, that "if the steam-engine be affixed to the freehold, it clearly does not pass to the assignees, because it does not come within the description of 'goods and chattels' within the 6 G. 4. c. 16. s. 72. This was determined in the case of *Horn v. Baker*; and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removable between landlord and tenant, and such as would not."

*Tenants' Fixtures, Goods, and Chattels; Possession, Order, and Disposition.* — And even tenants' fixtures, such as grates, stoves, and cisterns, &c., do not pass to the assignees. The lessee for years

of a house, who was also possessed of the fixtures therein by separate purchase, mortgaged his term with the fixtures, and afterwards became bankrupt; it was held that his assignee, who removed and converted them, was liable in trover by the mortgagee to pay the value of them while on the demised premises. *Boydell v. M'Michael*, 3 Tyrw. 974., S. C. 1 C. M. & R. 177.; see *Exp. Heathcote*, in Mont. D. & De G. 714. In the former case, *Mr. Baron Parke* said, "The real nature of the tenant's interest is, that he had a right to remove the fixtures during the term; that interest has been held sufficient to enable the sheriff to seize them under a fieri facias, but *Horn v. Baker* decides that they are not 'goods and chattels' within the meaning of the clause, as to the order and disposition of the bankrupt. The reason of this is, that with regard to real property, the possession is considered as nothing, but the title only is looked to." See *Hallen v. Runder*, 1 Cr. M. & R. 766., and *Minshall v. Lloyd*, 2 M. and W. 459., where the same learned Judge says, "I assent to the doctrine laid down in *Coombes v. Beaumont*, and *Boydell v. M'Michael*, that such fixtures are not goods and chattels within the meaning of the Bankrupt Law, though they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors."

If a tenant be permitted by his landlord to have possession of fixtures subject to the landlord's

right of property in them, they do not pass to his assignees as being in his order and disposition; on the contrary, he holds them under a special contract, which prevents them from being in his power of disposition at all. *Hitchman v. Walton*, 4 M. & W. 414., per *Lord Abinger*, C. B.

If a lessee borrow money on security of fixtures on leasehold premises, the lender has a lien on them for the money lent, yet they were not chattels subject to reputed ownership. *Exp. Spicer*, 3 M. & Ayr. 213., 2 Dea. 335., 1 Jur. 266.

*Steam-Engines, &c.*—Steam-engines, machinery, and fixtures are not so attached to the premises of which the bankrupt is in possession, as to be legally affixed to the freehold. *Exparte Wilson*, 4 Dea. & C. 314.; *Exparte Belcher*, Id. 703.; 2 Mon. & Ayr. 209.; *Exparte Spicer*, *suprà*.

A tenant of a cotton-mill, in which there were a steam-engine, boilers, &c., mortgaged the mill, engine, boilers, &c. to B., but remained in possession until his bankruptcy. The entablature plate of the engine, which however formed no part of the working apparatus, was fixed to the freehold of the mill; every other part of the engine was secured by bolts and screws, and might be removed without injury to the building. Held, that the steam-engine was not in the order and disposition of A. at his bankruptcy. *Hubbard v. Bagshaw*, 4 Sim. 326. See also *Exparte Lloyd*, 1 Mon. & Ayr. 494.

The lessee of a mill and steam-engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the height and extent of the mill, and removed all the works of the engine except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power. There was an injunction granted to restrain the assignees of the lessees, who had become bankrupt, from removing the parts of the new building and the new parts of the engine, subject to an action, to be brought by the lessors to try the right. *Sunderland v. Newton*, 3 Sim. 450.

Where a bankrupt was in possession of a factory, steam-engine, and fixtures, under a contract for the purchase, and the day before he committed an act of bankruptcy, he requested the vendor to re-sell and pay himself, and the vendor accordingly re-took possession, and the man then in charge for the bankrupt agreed to continue the charge of the property for the vendor; it was held that the steam-engine and fixtures were not in the order and disposition of the bankrupt. *Exparte Watkins*, 1 Dea. 296.

The owner of a freehold gave a mortgage for a term of years, but remained in possession; while in possession he added fixtures. Held, that the fixtures were not in his reputed ownership.\* *Exparte*

\* If a mortgagee be himself a trustee, to whom notice must be given, the transaction itself is notice enough to prevent reputed ownership. *Exp. Smart*, 2 M. & Ayr. 60.

Belcher, 2 M. & Ayr. 160.; see *Exparte Scarth*, 4 Jur. 826.

*Trade Fixtures, Goods, and Chattels; Possession, Order, and Disposition.*—As to trade fixtures, the assignees are entitled to such as the executor could claim against the heir, or the tenant remove as against his landlord, having regard to the quality of the estate. As to house fixtures, it is too much to say that whatever comes within the most comprehensive meaning of the word fixtures forms part of the realty, but only such as by their removal would do injury and waste to the premises. Per *Sir G. Rose*, *Exparte King* re *Walsh*, 4 Jur. 510.

*Steam-Engine.*—A mortgage was made of premises and machinery, which included a steam-engine, &c., erected for trade purposes and fixed to the freehold; the mortgagor continued in possession. Held, 1st, the steam-engine might be removed; 2dly, it was well mortgaged, and not in the reputed ownership. *Exparte Lloyd*, 1 M. & Ayr. 494., 3 D. & C. 765.

A lessee erects trade fixtures firmly attached to the freehold, but removable as between himself and the landlord. He then mortgages the premises by way of demise, by the same description as that in the lease, and without referring to the new erections, the sum secured being a floating balance limited to an amount greater than the pre-

mises would be worth without the fixtures. He becomes bankrupt. Held; that the mortgagee was entitled to the fixtures. *Exparte Bentley*, 2 Mon. D. & De G. 591.

The bankrupts purchased certain copyhold property with various fixtures erected thereon, which were in law removable, as between landlord and tenant, as well as on the principle of the benefit of trade. They afterwards mortgaged the property, together with all these fixtures, describing them precisely in the words used in the purchase deed, and after the mortgage, they erected on the premises some other fixtures of the like nature, and continued in the possession of the whole property up to the period of their bankruptcy. Held, that all these fixtures passed to the mortgagees, as parcel of the mortgaged estate, and were not to be considered as goods or chattels in the order and disposition of the bankrupts at the time of their bankruptcy, within the meaning of the 6 Geo. 4. c. 16. s. 72., *Exp. Reynal v. Hughes*, 2 M. D. & De G. 443.

A trader mortgages the trade premises in fee, and enters into partnership, and the firm carries on business on the same premises, and erects trade fixtures. Held, on their bankruptcy, that the mortgagee was entitled to the trade fixtures. *Exparte Cotton*, id. 725.

*Order.* — A., being owner in fee of certain hereditaments with a cotton-mill thereon, entered into

partnership with B. as cotton-spinners ; they then out of the partnership funds erected new machinery in the mill, and afterwards A., by himself, made a conveyance of the mill, together with all the machinery, erections, and buildings, by way of mortgage, to secure a partnership debt. A. and B. afterwards became bankrupts, having continued in the use and occupation of the mill, &c. &c. The assignees enter into possession, and sell the wheels, steam-engines, standing and going gears, shafts, steam and gas-pipes. Upon the petition of the mortgagees, praying that the produce of these articles might be paid over to them, as forming part of their mortgage security : It was held, that they were so entitled, and that they did not belong to the assignees, as goods and chattels, within the order and disposition of the bankrupts, by force of the 72d sect. of 6 Geo. 4. c. 16. *Ex parte Scarth*, 4 Jur. 826.

*Special Provision in Lease.* — By lease the lessor demised a colliery to the lessee, and all engines, machinery, and other implements, effects, and things then lying on or about the colliery, or used or employed therewith, and mentioned in a certain inventory and valuation then made, *habendum* for twenty-one years, at a certain rent therein mentioned. The lease contained a proviso for re-entry in case the rent should be in arrear for thirty days ; and also a proviso, that on the expiration or sooner determina-

tion of the demise, the lessee should leave and yield up to the lessor all engines, machines, effects, and things belonging to and used in the said colliery, and that an inventory and valuation should, three months previous thereto, be made and taken by two indifferent persons, to be appointed by the parties respectively, or by an umpire, and such inventory should be compared with the then present inventory and valuation, and that the difference in value of the engine, &c. should be paid by the landlord or tenant to the other, according as it was greater or less than the value at the time of letting. The tenant entered and occupied, and failing in payment of rent, the lease became forfeited, and the landlord recovered a judgment in ejectment in Trinity term, 1818, but did not execute his writ of possession until 9th of November, 1819. On the following day the tenant committed an act of bankruptcy. The lease having become forfeited by the act of the tenant, no inventory or valuation of the machines, &c. was made three months before the determination of the lease. Held, that as lessee had hereby rendered it impracticable for the landlord to have a valuation made three months before the determination of the demise, the latter was entitled, without any such valuation having been made, to resume possession of the fixtures, machinery, and other effects used in the colliery, upon the determination of the demise by such forfeiture; and



that he was entitled to resume such possession even of new machinery erected by the tenant during the term. Held, secondly, the tenant never had, under this demise, the possession, order, or disposition of the fixtures or movable articles within the meaning of the 21 Jac. 1. c. 19., but a mere qualified right to use them during the term; and if they had been in his possession, &c. within the meaning of this statute, that would have ceased when landlord resumed possession on the 9th of November. During the intermediate time between recovery of the judgment in Trinity term, 1818, and execution of the writ of *habere facies possessionem* on 9th of November 1819, the bankrupt continued to work the colliery, and to have the use of the machinery and implements: Held, that during this period the bankrupt had not the order or disposition of the machinery and implements within the statute of James. *Storer v. Hunter*, 3 B. & C. 368. J. C. 5 D. & R. 240.

*Equitable Mortgage.* — A bankrupt, becoming the owner as well as occupier of a freehold cotton mill, gave the petitioners an equitable mortgage on it; "together with the steam-engines, and also all and singular other the movable and fixed machinery and steam-engines then in, upon, about, and belonging to the said steam-mill and premises or occupied or used therewith," and the bankrupt continued in possession of the mill and fixtures up to the period of his bankruptcy: Held,

that all the parts of the machinery and fixtures, which were so attached to the premises as to be legally affixed to the freehold, were not to be considered as goods and chattels within the 72nd sec. of the Bankrupt Act, and that the assignees had no right to them as against the equitable mortgagee. *Exp. Wilson*, 4 Dea. & C. 143., 2 Mont. & Ayr. 61.

A memorandum of deposit accompanying an equitable mortgage stated that the bankrupt had deposited "the deeds and documents under which I hold the steam-mills, cottages, land, buildings, and premises at L.:" Held, that the equitable mortgagee had a lien on the fixtures, whether erected before or after the time of the deposit, and including those that were removable between landlord and tenant. *Exparte Price*, 2 Mon. D. & De G. 518.

*Custom.*—Machinery affixed to the freehold of iron works is not considered to be within the order and disposition of the bankrupt trader, where, by the custom of the county, such articles are furnished by, and continue to be the property of, the lessor. *Rufford v. Bishop*, 5 Russ. 346.; and see *Hubbard v. Bagshaw*, 4 Sim. 326.

In 1797, premises in L., described as "land, a dwelling-house, machine-house, and other buildings and erections," were conveyed in fee to one of several partners. The conveyance stated them to be then in the possession of that partner, and

another of his then partners. Machinery and utensils were afterwards placed thereon by the firm for the purpose of carrying on the business of calico printers. The machinery and utensils were firmly fixed to the freehold, yet in such manner that they might be easily removed without material injury to themselves or the buildings. In that part of the country similar articles so fixed are commonly bought, sold, and removed, without treating them as fixtures. In taking stock yearly between 1804 and 1825, the buildings and land were valued and classed separately from the machinery and fixtures, but the whole was always dealt with and considered as partnership property. In 1828, two of the partners (then seised in fee of the freehold land and buildings under a conveyance not mentioning machinery or fixtures) mortgaged them for a term; "and also the steam-engine, mill-gearing, heavy gear, millwright work, fixed machinery, and other matters and things standing and being in or upon the thereby demised buildings, works, and premises, which in any manner constitute fixtures and appendages to the freehold of the same, or any part thereof." They remained in possession, and carried on the works till 1829, when they compounded with their creditors, and afterwards, till they became bankrupts. In April 1831 their assignees sold and removed the machinery and utensils, except two steam-engines, with the first motion and

main shafts attached to them, and two water-wheels which supplied power to the rest: Held, first, that the machinery and utensils so removed, having been affixed to the inheritance for the purposes of trade only in a place where as such they would have commonly been removed, and being in fact removable without injury to the freehold, were not to be taken as part of the inheritance, but as personal estate only, which passed to the assignees of the bankrupt. Secondly, that the mortgage deed was only intended to pass that part of the machinery which, from the circumstances of its erection, necessarily became part of the freehold. *Trapps v. Harter*, 3 Tyrw. 603.; S. C. 2 Cr. & Mee. 153. 718.

Where the assignees rely upon the custom of the country to raise a title by order and disposition, but the evidence of usage is both ways, this will not entitle the assignees, it lying upon them to prove the reputed ownership. *Exparte Scarth*, 4 Jur. 826.

Until severance, the fixtures are part of the freehold, and cannot therefore be said either to be "goods and chattels," or to be in the "order and disposition" of the person in possession. "The reason of this is, that with regard to real property the possession is considered as nothing, but the title only is looked to." *Boydell v. M'Michael*, 1 Cr. M. & R. 177., per *Parke B.*

*Time of Removal by Assignee.*—The right of a

tenant to remove fixtures continues only during his original term, and such further period as he holds under a right to consider himself as tenant. Where, therefore, the term pursuant to a proviso in the lease was forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee still continued in possession, removed and sold a fixture put up by the lessee for the purposes of trade, and the jury found that it was not removed within a reasonable time after the entry of the lessor: Held, that they had no right to remove it, and that the lessor might recover it in trover. *Weston v. Woodcock*, 7 M. & W. 14. \* See *post*.

\* *Semble*. Such would have been the case even without such finding of the jury. *Id*.

## CHAPTER VI.

*Of the Rights, Liabilities, and Exemptions of Parties in respect of Fixtures.*

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SECT. I. *Of Matters of a Public Nature, and herein of the Right of Voting.*

SECT. II. *Of Exemption from Distress.*

SECT. III. *Of Exemption from Seizure in Execution.*

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## SECTION I.

*Of Matters of a Public Nature, and herein of the Right of Voting.*

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*Fixtures estimated in valuing Property. — Matters of a public Nature. — Weighing Machine. — Carding Engine. — Mode of Assessment. — Railways. — Underwoods. — Timber. — Water and Gas Pipes. — Parochial Settlements. — Stoves, Cupboards. — Kilns. — Ferry. — Windmill must be actually affixed. — Right of Voting.*

*Fixtures estimated in valuing Property. —* As has been already frequently observed, personal chattels, on their being affixed to the freehold, immediately become part and parcel of the realty ; and in all cases, therefore, where it is necessary to ascertain the value of real property, such annexation ought to be taken into consideration, and should form part of the value, and the esti-

mate made accordingly. Thus, where the law casts a duty upon an individual in respect of his real property, in calculating the amount of his liability, whatever chattels may have been annexed to such property ought to be taken into consideration, and he should be charged upon such increased value. Again, where the law confers a privilege in respect of the possession of real property, in ascertaining the amount of its value, in order to determine the qualification of the possessor, the fixtures attached to such property should be estimated, and upon such increased value the right determined. Thus, where one seeks to establish a right to the elective franchise in respect of property, which by itself is under the required qualification, but which, in consequence of its having a windmill or other chattel attached to it, or let into the soil, is of increased value, the qualification must be ascertained with reference to such increased value; likewise in the establishment of parish settlements, fixtures have always been taken as increasing the value of the property to the sum requisite to confer the settlement.

*Of Matters of a Public Nature.*

*Rating.* — Under the Poor Law Acts, every occupier of lands and houses in a parish is liable to be rated according to their annual value for the relief of the poor, and it has been determined

that such value may be ascertained with reference to the annexation of personal chattels.

*Weighing Machines.*—Thus it has been held that the profits of a weighing machine, and of other machinery, and engines affixed to the freehold, are rateable according to the additional value they give to the premises. *R. v. St. Nicholas (Gloster)*, Cald. 262.; *R. v. Birmingham and Stafford Gas-light Co.*, 6 Ad. & E. 634.

*Carding Engine.*—So a house with a carding engine, described in the rate as an engine-house, and both let and occupied together, (although it did not appear whether the engine was affixed to the building,) was considered as an entire subject, and to the extent of their annual value properly so rateable to the poor. *R. v. Hogg*, 1 T. R. 721.

So an engine set up by a lessee for the purpose of working a coal-mine was held liable to be rated, the 43 Eliz. c. 2. subjecting coal-mines to a rate. *R. v. Granville (Lord)*, 9 B. & C. 188. But these are the only mines liable to be rated, the statute not applying to any other. See *R. v. Bilston*, 5 B. & C. 851.; *R. v. Birmingham and Stafford (Gas Company)*, *suprà*; *R. v. Shrewsbury (Paving Trustees)*, 3 B. & Ad. 216.; *R. v. Manchester and Salford (Waterworks Company)*, 1 B. & C. 630.; *R. v. Brighton (Gas Co.)*, 5 B. & C. 466.; *R. v. Birmingham (Gas and Coke Company)*, 1 B. & C. 506.; *R. v. Bath (Corp.)*, 14 East, 609.; *R. v. Bell*, 7 T. R. 598.; *R. v. Chelsea*



(Waterworks Company), 5 B. & Ad. 156; *R. v. Rochdale (Waterworks Company)*, 1 M. & S. 634.

*Mode of Assessment*—In a rate laid upon buildings to which machinery is attached for the purpose of manufacture, the real property ought to be assessed according to its actual value as combined with the machinery, without considering whether the machinery be real or personal property, and liable or not to distress or seizure under a *fi. fa.*, or whether it would go to the heir or executor, or at the expiration of a lease, to the landlord or tenant. *Reg. v. Guest*, 7 Ad. & E. 951.

*Railways*.—As to rating railways which are increased in value by the rail, see *Reg. v. Grand Junction (Railway Company)*, 4 Q. B. 18., 8 Jur. 508.

*Underwoods*.—Saleable underwoods are rateable annually to the relief of the poor, within the 43 Eliz. c. 2., in proportion to their value, though they should happen not to be cut down more than once in twenty-one years, and their annual value may be estimated, amongst other ways, according to the value they may be worth to rent for a lease of the duration of their intended growth. *R. v. Mansfield*, 10 East, 219.

Saleable underwood under the statute means such shoots from old stools as are capable of reproduction, and of being located by the woodowner, so as to yield a succession of profits. *Reg. v. Narberth (North)*, (Inhab.), 9 Ad. & E. 915.

Therefore, where a plantation of oak was cut down in 1786, and shoots grew up from the stools, which were occasionally weeded, and at the end of fifty years the wood-owner cut some every year, which he sold for colliery purposes and for firewood, and the sessions decided that they were not saleable underwood, the Court held that they would not disturb their decision, although it seems, per *Coleridge J.*, that the decision was wrong upon the facts. *Id.*

*Timber.*—If beech be timber by the custom of the country, it is not rateable. *R. v. Minchin*, *Bur.* 1308.

*Fir and Larch.*—Where fir and larch were planted with oak and ash trees, principally for the purpose of affording a screen or shelter for the latter in their infancy, and were cut from time to time as such oak and ash required more room to spread, and when once cut did not spring again: Held, that although when sold they yielded a profit, they were not saleable underwood, within the statute 43 Eliz. c. 2., as the primary object in planting them was not to derive a profit by sale, and consequently not rateable. *R. v. Ferrybridge*, 1 B. & C. 375.\*

*Water and Gas Pipes.*—It has been held that pipes laid down and fixed in the ground, are to be deemed a part of the soil, and are rateable in the

\* *Quære*, whether under any circumstances fir and larch can be considered underwood? It seems not. *Id.*

parish in which they are situate, according to the profits derived from the pipes by the conveyance of water and gas. *R. v. Rochdale (Waterworks Company)*, 1 M. & S. 634.; *R. v. Brighton (Gas Company)*, 5 B. & C. 466.

*Parochial Settlements.*

In ascertaining the value of property in right of which a pauper seeks to establish a parochial settlement, fixtures attached thereto, are to be considered as a part of the property and the value estimated accordingly.

*Stoves and Cupboards.*—Thus, a settlement may be acquired by renting a tenement of the yearly value of 10*l*. If the house, however, be of less value, but, in consequence of stoves and cupboards being affixed therein, is increased in value to the requisite amount, the court will hold that it was a tenement sufficient to confer a settlement. *R. v. St. Dunstan*, 4 B. & C. 686.

*Kiln.*—It was considered that a settlement was gained by renting a lime-kiln of greater value than 10*l*. *R. v. Iken*, 4 M. & N. 117.

The taking of a tenement, which, in consequence of having been cropped by the landlord with clover and grass seeds when let to the tenant, was worth 10*l*. a year, but which without that circumstance would have been worth a much less annual value, will confer a settlement. *R. v. Purly*, 16 East, 126.

*Ferry.*—A pauper rented a cottage and premises, including a ferry, with the use of a boat and line across an adjoining river. The premises without the ferry were not worth 10*l.* a year: Held, that the ferry might be included in order to make up the necessary value; and that, supposing the boat and line to be distinct personal chattels, the court would not presume that the value of the tenement would be insufficient without them, upon a case reserved which did not show such insufficiency. *R. v. Fladbury (Inhabs.)*, 10 *Ad. & E.* 706.

*Windmill.*—A pauper rented land in A. of the annual value of 6*l.* 10*s.* 6*d.*, and built on part of it a post windmill, at the expense of 120*l.*, which, by agreement with his landlord, he was to be at liberty to remove at pleasure. He let the mill for part of the time at the rent of 9*l.* per annum: Held, that this was not the taking of a tenement of 10*l.* a year; and consequently the pauper gained no settlement in A. *R. v. Londonthorpe*, 6 *T. R.* 377.

*Must be affixed.*—The thing rented must be actually affixed: therefore, where the pauper had held a cottage, garden, and windmill, at the rent of 30*l.*, and had paid the poor rates in respect of that sum; the mill was of wood, and rested on a brick foundation, but was not in any way fastened to the brickwork or let into the ground: this, it was held, was not a tenement, and the pauper

gained no settlement. *R. v. Ottley (Inhabs.)*, 1 B. & Ad. 161.; see also *R. v. Londonthorpe*, *antè*.

*Of the Right of Voting.*

There can be no doubt but that upon the principle of the rule with regard to the annexation of personal chattels to the realty, a party would be entitled to vote in respect of property whose value had been increased by such annexation. See *R. v. Ottley (Inhabs.) supra*.

## SECTION II.

*Of Exemptions from Distress.*

*The Rule as to.—Extent of Privilege.—Smith's Anvil.—Bellows, &c.—Furnaces.—Millstones.—Kiln.—Tenant's Fixtures.—Kitchen Ranges, &c.—What Subject of.—Public-House Fixtures.—Landlord's Lien.—Constructive Annexation.—Charters.—Deer.—Fish.—Growing Crops.—Nursery Trees.*

*Rule as to.*—THE rule of law has been long established, that whatever is affixed to the freehold is exempt from distress, for that which is part of the freehold cannot be severed from it without detriment to the thing itself in the removal, consequently it cannot be such a pledge as may be restored in the same condition to the owner: besides, that which is affixed to the freehold is often part of the thing demised; those things, therefore, which savour of the realty are not distrainable. Co. Lit. 47.; Gibb. Dist. 34. 48.; Bro. Abr. tit. "Distress," pl. 29.; Com. Dig. "Distress" (C). See *Davies v. Powell*, Willes, 46.; *Simpson v. Hartopp*, Id. 514.; *Gorton v. Falkner*, 4 T. R. 567.; 569.; *Pitt v. Shaw*, 4 B. & Al. 208.; *Darby v. Harris*, 1 Q. B. 895.

*Extent of Privilege.*—The privilege extends to such things as the tenant will not be permitted on

any consideration to remove with him from the premises by reason of their being annexed to, and considered as part of the freehold, and not because they are absolutely affixed to the freehold, and cannot be removed therefrom, for a mere temporary removal for purposes of necessity is not sufficient to destroy the privilege. *Gorton v. Falkner*, 4 T. R. 567.; Bro. Abr. tit. "Distress," pl. 23.

*Smith's Anvil*. — Therefore, a smith's anvil, on which he works, is not distrainable; for it is accounted part of the forge, though it be not actually fixed by nails to the shop. 14 H. 8. c. 25.; Bro. Abr. tit. "Distress," pl. 23.; *Broad v. Jollie*, 2 Rol. 202. See *Twigg v. Pitts et al.*, 3 Tyrw. 969.

*Smiths' Bellows, &c.* — Nor blacksmiths' bellows, anvils, and blocks, vices, lathes, shelves, grates, grindstones, and benches. *Twigg v. Pitt et al.*, *suprà*.

*Furnaces, &c.* — Nor furnaces, cauldrons, &c., fastened to the house. Co. Lit. 47.; Com. Dig. tit. "Distress" (C).

*Millstone*. — So a millstone is not distrainable, although removed out of its proper place, in order to be picked, because such removal is of necessity, and the stone still continues to be part of the mill. *Id.*

*Kiln*. — Nor a kiln, which is considered not to be a chattel personal, but belonging to the freehold. *Niblet v. Smith*, 4 T. R. 504.

*Tenants' Fixtures.* — And the same law applies to tenants' fixtures: it has therefore been held that —

*Kitchen Ranges, &c.* — Kitchen ranges, stoves, coppers, and grates, which a tenant may sever from the freehold and take away during the term, are not distrainable for rent. *Darby v. Harris*, 1 Ad. & E., N. S., 895.

*What Subject of.* — Those things only can be distrained for rent which the landlord could afterwards restore in the plight in which they were before the distress. *Id.*

*Public-house Fixtures.* — A landlord distraining for rent in arrear from the tenant of a public-house seized certain beer-machines, &c., affixed to the freehold, and removed them from the premises: Held, that trover lay for these articles, and that, although for the purpose of that action the tenant treated them as goods and chattels, the landlord could not justify distraining them for rent in arrear. *Dalton v. Whittern*, 12 Law, J., N. S.; 55 Q. B.

*Landlord's Lien on Fixtures under Execution.* — A landlord, it would seem, is not entitled to a year's rent under the 8 Ann. c. 14. from an execution creditor who has seized and severed fixtures under a *feri facias*, the intention of the statute being to compensate the landlord for the right of distress of which the execution deprives him: and as fixtures are not distrainable, so he can have



no lien on them: but see, *contra*, *Duck v. Braddyl*, M'Clel. 217.; 13 Price, 455.

It is made a *quære*, whether machinery, fixed by bolts to the door of a factory, is distrainable by a landlord for rent. *Duck v. Braddyl*. Id.

*Constructive Annexations.* — Keys, locks, doors, windows, &c. are not distrainable, nor a millstone, though severed from the mill. Co. Lit. 47 *b.*; 14 H. 8. c. 25.; Com. Dig., tit. "Distress" (C).

*Charters.* — Charters are not distrainable, for they are not chattels in law. Br. Ab., tit. "Distress," 29.

*Deer, Fish, &c.* — Deer, fish, conies, &c. cannot be distrained. Co. Lit. 47 *a.*; Com. Dig., tit. "Distress" (C); 2 Inst. 133. But see *Davies v. Powell*, Willes, 46.; 7 Mod. 249.

*Growing Crops.* — This subject is fully discussed in Woodfall, 5th ed., 326.

*Nursery Trees.* — Trees growing in a nurseryman's ground, who is a yearly tenant to the plaintiff, and removable by such tenant from time to time, are not distrainable for rent under 11 Geo. 2. c. 19. s. 8. *Clark v. Calvert*, 3 Moore, 96.; *Clark v. Gaskarth*, 2 Moore, 491.

## SECTION III.

*Of Exemption from Seizure in Execution.*

*Sheriff may seize Tenant's Fixtures.*—Cannot seize Furnaces, &c.—Hearths, &c.—Dyer's Vat.—Where Property of Landlord.—When severed without Landlord's Consent.—Where Debtor, Owner in Fee.—Where Windmill sold by Debtor, who continues in possession.—Where Lease and Fixtures seized, latter may be sold.—Fixtures in Paper-Mill not liable to, under Extent.

*Sheriff may seize Tenant's Fixtures.*—WHERE a tenant has a right to sever fixtures, they become so far his personal property, that they are liable to be seized and severed under a writ of *feri facias*. And it was accordingly holden in Poole's case, that fats, coppers, tables, partitions, &c., which were things set up by the lessee for the convenience of his trade, and which he was entitled to remove at the end of his term, might be seized in execution under a writ of *feri facias*. Poole's case, 1 Salk. 368. ; and see *Elwes v. Maw*, 3 East, 38. ; *Ryall v. Rolle*, 1 Atk. 76. See Archb. Prac. 428. ; *Trapps v. Harter*, per Lord *Lyndhurst*, 3 Tyr. 619. ; 4 Id. 673. n. a. ; *Duck v. Braddyl*, M'Clel. 217. ; *Storer v. Hunter*, 3 B. & C. 368. ; *Minshall v. Lloyd*, 2 M. & W. 459. ; *Place v. Fagg*, 4

Man. & R. 277., per *Bayly*, J.; *Winn v. Ingilby*, 5 B. & Al. 625.; *Pitt v. Shaw*, 4 B. & Al. 206.; *Evens v. Roberts*, 841. But if the things so affixed shall go to the heir and not to the executor; the sheriff has no right to seize them. *Winn v. Ingilby*, 5 B. & Al. 625. See *Steward v. Loomb*, 4 Moore, 481.; *Scorell v. Boxall*, 1 Y. & J. 398.; see also *Trapps v. Harter*, 3 Tyrw. 604.

*Cannot seize Furnaces, &c.* — So he cannot seize furnaces, ovens, doors, windows, &c. Com. Dig. "Execution."

*Hearths, &c.* — Nor hearths, chimney-pieces, &c. *Poole's case*, 1 Salk. 368.

*Dyer's Vat.* — A dyer's vat fastened to the wall of a house is parcel of the freehold, and cannot be taken in execution under a *feri facias*. *Day v. Bisbitch*, Cro. El. 374. S. C. Owen, 70.

*Where the Property of the Landlord.* — Where the fixtures are the property of the landlord and part of the thing demised, then they cannot be disannexed from the house under the writ of execution; but the lease may be sold, and the assignee will be entitled to enjoy the fixtures during the term as part of the house. *Gordon v. Harper*, 7 T. R. 9.; S. C. Esp. 465.

*Where severed without Landlord's Consent.* — Where mill-machinery and a mill were demised to a tenant for a term, and he severed the machinery from the mill without the consent of his landlord, and it was afterwards seized by the sheriff

under a *fi. fa.* and sold by him: Held; that no property passed to the buyer under such sale. *Farrant v. Thompson*, 5 B. and A. 826. ; 2 D. & R. 1. See *Steward & Loombe*, 4 Moore, 281. ; see also *Rufford v. Bishop*, 5 Russ. 346. And so it would be in every case where a tenant severs from the freehold fixtures which he cannot afterwards remove. 1 Archb. Prac. 428.

*Where the Debtor is the Owner in Fee.*—Nor can the sheriff seize fixtures under an execution against a debtor who has the freehold himself. Thus, the sheriff cannot seize setpots, ovens, and ranges, which were annexed to a house the freehold of which was in the person against whom the writ issued. *Winn v. Ingilby*, 5 B. & Al. 625. ; *Place v. Fagg*, 4 M. & R. 277. See *Colgrave v. Dios Santos*, 2 B. & C. 76.

*Where Windmill sold by Debtor who continues in Possession.*—Where A., seised in fee of a close on which a windmill was erected, mortgaged the close to B. for 1000 years, and in the same deed there was a conveyance by bargain and sale of the mill to him in fee: the mill was built of wood, removable at pleasure, and fixed to brickwork which was let into the ground: Held, that the mill could not be taken in execution under a *fi. fa.* sued out against A. by one of his creditors, although he had continued in possession, and carried on his trade therein. *Steward & Loombe*, 4 Moore, 281., 1 B. & B. 506.

*Where Lease and Fixtures seized, the latter may be sold.*—Where a sheriff takes a lease and fixtures in execution, he may sell the fixtures separately, if he cannot find a purchaser for the whole. *Barnard v. Leigh*, 1 Stark. 43., per *Ellenborough*.

*Fixtures in Paper-Mill not liable under an Extent.*—Fixtures demised with a paper-mill, and used by the tenant in the manufacture of paper, are not liable to be seized under an extent for duties upon paper owing by the tenant to the Crown, as utensils for the making of paper in the custody of the tenant under the statute 34 G. 3. c. 20. s. 27. *Attorney-General v. Gibbs*, 3 Y. & J. 333.

## CHAPTER VII.

*Of the Law relating to Heirlooms, and Chattels in nature thereof.—Charters.—Deeds, &c.*

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SECT. I. *Of Heirlooms, and Chattels in nature thereof.*

SECT. II. *Of Emblements, Chattels Vegetable, &c.*

SECT. III. *Ecclesiastical Persons.*

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## SECTION I.

*Of Heirlooms, and Chattels in Nature thereof.*

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*Definition.* — Cannot be devised. — What are Heirlooms. — Chattels in nature thereof. — Coat-armour. — Pensions. — Tombstones. — Monuments. — Gravestones. — Tombs. — Mourning Ornaments, &c. — Bells. — Grates, &c. — Charters, Deeds, &c. — Tenant in Tail. — Tenant in Fee. — Personal Chattels settled or devised as Heirlooms. — Deer. — Fish. — Chattels Vegetable. — Apples. — Hedges, &c. — Exception.

*Definition.* — HEIRLOOMS are a very peculiar species of property; they consist of goods and chattels, which, but for some particular custom, would go to the executor of the owner.

In *Les Termes de la Ley*, tit. “Heireloome,” (a book said by Mr. Justice Bayly, in *Hawkins v.*

Shipham, 5 B. & C. 229., to be "of great antiquity and accuracy,") "Heireloome" is defined to be "any piece of household stuff, which by the custom of some countries, having belonged to a house for certain descents, goes with the house (after the death of the owner) unto the heir, and not to the executors." See Co. Litt. 18 *b*. Bro. Descent, pl. 43.; Spel. Glos. voce "Heirloom." But see 2 Bl. Com. 427.; *Petre v. Meneage*, 12 Mod. 520.; and see S. C. 1 Lord Raym. 728. Blackstone, *supra*, says, there are some chattels which are considered as so annexed and necessary to the enjoyment of the inheritance, that they are deemed in law to be part of it, and descendible to the heir, whence they are called heirlooms. Thus deer in a real authorised park, fishes in a pond, rabbits in a warren, and doves in a dove-house, are held to be part of the inheritance, and to belong to the heir and not to the executor. See Cru. Dig. tit. 1. sect. 5.

*Cannot be devised.*—It is said that if a man be seised of a house, and possessed of divers heirlooms, that by custom have gone with the house from heir to heir, and by his will deviseth away the heirlooms, this devise is void. Co. Lit. 185 *b*.; 18 *b*. See 2 Ven. Lec. 380.; Com. Dig. tit. "Biens" (B) (H). In *Tipping v. Tipping*, 1 P. Wms. 730., the Lord-Chancellor says, "I take it that paraphernalia are not devisable by the husband from the wife, any more than heirlooms from the heir."

*What are Heirlooms.*—Ancient jewels of the Crown go to the successor. Co. Lit. 18 b.; Com. Dig. tit. "Biens" (B); but see *Hastings v. Douglas*, Cro. Car. 844. The best bed, table, pot, pan, cart, or other dead chattel movable. Id. ibid. An ancient horn, where the tenure of the land is by cornage. Id. *Pusey v. Pusey*, 1 Vern. 273. So a coat of armour, pennons, tombstones.\*

*Chattels in nature of Heirlooms*, and monuments in a church in honour of the ancestor, Id. ib., although annexed to the freehold, which is in the parson, for they were hung up there in honour of the ancestor, and therefore are in the nature of heirlooms, which by the common law belong to the heir, as being the principal of the family. *Corven's case*, Co. R. 105.

*Gravestones, Tombs.*—The like law of a gravestone, tomb; and the like. † Id. Co. Lit. 118 b.; *Francis v. Ley*, Cro. Jac. 369.; *May v. Gilbert*, 2 Bulster, 151. ‡; see 2 Bl. Com. 428. But see *Gib. Cod.* 454.

*Mourning, Ornaments, &c.*—But things that

\* *Quere*, whether the property of tombstones is in the rector. *Hitchcock v. Walford*, 2 Jur. 326.

† Trespass lies against the party who wrongfully removed a tombstone from a church-yard, and erased the inscription. *Spooner v. Brewster*, 3 Bing. 136.; Com. Dig. tit. "Cemetery" (C).

‡ The property in the shroud and coffin remains in the executors, and may be so laid in an indictment. 2 Russ. on Crimes, 163.; and see *Seagur v. Bowl*. 1 Add. 541. *Spooner v. Brewster*, 3 Bingh. 136..



are fixed up in a church, not in honour of individuals, but merely to put the church in mourning, or when ornaments or scaffolding, &c. are put up on public occasions, these become the property of the parson. Amos & Ferrard, 172.

The ornaments of the chapel of a preceding bishop belong to his successor. Corven's case, *antè*. So if an incumbent enter upon a parsonage house in which are hangings, grates, iron backs to chimneys, and such like, not put up by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall not have them, but they shall continue in the nature of heirlooms; but if the last incumbent fixed them there only for his own convenience, it seems they shall be deemed as furniture or household goods, and shall go to his executor. 4 Burn. Ecc. L. 304., 8th ed.

*Bells.*—The bells are parcel of the freehold of the church. 11 H. 1. c. 12. See *R. v. Axminster* (Churchwardens), Sid. 206.

Under a devise of all jewels, &c., a garter and collar of S. S. shall pass to the heir as heirlooms. Northumberland's case, Owen, 124.

*Charters and Deeds.\**—So charters, court-rolls,

\* See *Upton v. Ferrers*, 5 Ves. 801., where a question was raised, but not determined, whether the executor was entitled to the Journals of the House of Lords, which are delivered to Peers.

deeds, and other evidences of the land\*, with the chests in which they are preserved. Com. Dig. tit. "Biens" (B); Id. tit. "Charters" (A); Touch. 97.; Went. Off. Ex. 153. 156., 14th ed.; Cru. Dig. tit. 1. s. 6. This rule only applies to those which relate to the freehold and inheritance.

*Tenant in Tail*, having an estate of inheritance, has a right to all deeds and muniments belonging to the lands, which the Court of Chancery will order to be given up to him. *Harrington v. Prior*, B. & Ad. 170.; 1 Cru. Dig. tit. 2. s. 39.

*Tenant for Life*.—Although every person having a freehold interest is entitled to the title-deeds, yet Lord Hardwick has said it was the common practice for the Court of Chancery to direct them to be taken from the tenant for life, and deposited in the court. *Burgess v. Mawby*, 1 Turn. & R. 174. When they may keep the title-deeds, see *Papillon v. Voice*, 2 P. W. 477.; *Ivie v. Ivie*, 1 Atk. 431.; *Webb v. Lymington*, 1 Eden, 8.; *Hicks v. Hicks*, Dick. 650.; *Fond v. Feering*, 1 Ves. Jun. 72.; and see a note where all the authorities are collected in Cru. Dig. tit. 3. ch. 1. s. 31.

*Personal Chattels settled or devised as Heirlooms*.—For the cases on this subject, see Co. Lit. 18 b.

\* At Common Law larceny could not be committed of them. 2 Russ. on Crimes, 141.; but see 7 & 8 G. 4. c. 29. s. 23.

n. 109. by Hargrave; *Foley v. Burnell*, 1 *Brow. Ch. R.* 275.; *S. O. Cowp.* 435. in not.; *Vaughan v. Burslem*, 3 *Id.* 101.; *Cadogan v. Kennet*, *Cowp.* 432.; *Can v. Errol*, 14 *Ves.* 478.; *Gower v. Grosvenor*, *Barnard. C. C.* 54.; *Wyth v. Blackman*, 1 *Ves. Sen.* 202.; *Boon v. Cornforth*, 2 *Id.* 277.; *Trafford v. Trafford*, 3 *Atk.* 347.; *Saville v. Scarborough*, 1 *Swanst.* 537.; sale and *ante*, p. 127.

*Deer, Fish, &c.*—There is another species of property which is incident to the enjoyment of the inheritance in land, and which always accompanies it, and vests in the heir and not in the executor\*; and so it has been held that if a man die *seised* of a park, the heir shall have the deer, and not the executor. *Vin. Abr. tit. "Exors." (Z)†*; *Com. Dig. tit. "Biens" (B)*. So of hares, rabbits, pheasants, and partridges, because without them the park, which is an inheritance, is not complete. *Id.*

*Fish.*—If a man buy divers fish, as carp, tench, &c., and put them for store in his pond, and die, the executor shall not have the fish, but the heir, who has the water. *Id.*; *Went. Off. Ex. Com. Dig. tit. "Biens" (B)*; and see *Id. (F. c.)‡*; *Parlet and Bartholomew v. Cray*, *Cro. El.* 372.

\* The right to this species of property is not founded, as heirlooms, upon any special custom, but upon the nature of the chattels themselves.

† See per *Willes*, C. J., *Davies v. Powell*, *Willes*, 46.

‡ The destruction of these things is waste, *Vin. Ab. Waste. (E.)*

*Chattels Vegetable.*—There is also another species of property as to the right to which questions have frequently been raised, and although they are not properly to be considered fixtures, yet from their intimate annexation with the soil, they have been held to follow the nature of their principal, and to descend on the death of the owner to his heir, and not to pass to his personal representative, unless indeed they have been severed from the tree itself, or from the ground: these are the fruits of a plant, a tree, or the whole tree itself. 2 Bl. Com. 389.; Com. Dig. “Biens” (H); Liford’s case, 11 Co. 48 a.

*Apples, &c.* — Therefore apples, pears, and other fruits hanging on the trees at the time of the death of the ancestor shall go to the heir. Gilb. Ev. 210.; 2 Bl. Com. 123.; Com. Dig. *suprà*.

*Hedges, &c.* — So it is of hedges, bushes, &c. Com. Dig. *suprà*.

*Exceptions.* — But there are cases which form an exception to this rule, as where tenant in fee simple grants away the trees, they vest in the grantee, and go to the executor; for in consideration of law they are divided as chattels from the freehold. *Stukely v. Butler*, Hob. 173.; Com. Dig. *suprà*; so when the tenant in fee simple sells the land and reserves the trees from the sale. *Herlakenden’s case*, 4 Co. 63 b.; Went. Off. Ex. 146. 267.

## SECTION II.

*Of Emblements.*

*Definition.*—*Acorns, Fruit, or other Trees.*—*Exception.*  
— *When the Executor is entitled to Emblements.*—*Right*  
*of Executor of Tenant for Life to Emblements.*

*Definition.*—EMBLEMENTS are the profits of the lands which have been sowed. *Les Termes de la Ley*, tit. "Embleaments." Emblements are called *fructus industriales*, and therefore include those vegetable chattels only, such as corn, grain of all kinds, hemp, flax, saffron, hops, turnips, carrots, potatoes, melons, &c., and all those *annual* products of the earth which are not spontaneous, but require manurance, labour, and industry. *Co. Lit.* 55*b.* and note 1. *Went. Off. Ex.* 147. 153.; *Latham v. Attwood*, *Cro. Car.* 515.; *Anon.* 2 *Freem.* 210.; 9 *Vin. Abr.* 373., tit. "Emblements," pl. 82.; *Graves v. Weld*, 5 *B. & Ad.* 105. These, although annexed to and growing upon the land at the time of the occupier's death, yet, as between the heir and executor of the person seised of the inheritance, and between the remainderman and the tenant for life, they are considered

as chattels, and pass as such.\* See 1 Wms. Exors., last ed. 556.

*Acorns; Fruit or other Trees.*—It must be an annual product. See *Graves v. Weld*, 5 B. & Ad. 118. And, therefore, acorns sowed in land, or young fruit trees planted, or oak, elm, ash, or other trees, cannot be considered as emblements. Co. Lit. 55 b.; Com. Dig. tit. “Biens” (G).

*Exception.*—The case of shrubs, trees, &c., planted by gardeners and nurserymen, forms an exception. *Penton v. Robart*, 2 East, 90., by *Lord Kenyon*; *Lee v. Risdon*, 7 Taunt. 191., by *Gibbs*, C.J.; see *Wyndham v. Way*, 4 Taunt, 316., by *Heath*, J.; see also *Watherell v. Howells*, 1 Campb. 227.; *Empson v. Sodon*, 4 B. & Ad. 656.

*When the Executor is entitled to Emblements.*—Where the deceased is seised in fee simple of the land, his personal representatives are entitled to emblements as against the heir. Co. Lit. 55 b. n. 2.; *Lawton v. Lawton*, 3 Atk. 16., Com. Dig. “Biens” (G) (2.) So if seised in fee tail, as against the heir in tail. Com. Dig. *id.*; Went. Off. Ex. 145.

If, however, a man seised in fee sow the land, and then convey it away and die before severance,

\* They may be seized under a *fi. fa.*, and a sale of them while growing is not a contract or sale of any lands, &c., or any interest in or concerning them, within the 4th sec. of the Stat. of Frauds. *Evans v. Roberts*, 5 B. & C. 829.; by *Hullock B.*, in *Scorell v. Boxall*, 1 Y. & J. 398. See also *Jones v. Flint*, 1 P. & D. 594.; *antè*, 116.

the crops will not go to the executor of him who conveyed away the land, but will pass with the soil, as appertaining to it. *James v. Portman*, Owen, 102., by *Popham*, J.; *Romney's case*, 2 Vern. 323., Com. Dig. tit. "Biens" (H) (2.)

*Right of Executor of Tenant for Life to Emblements.* — The rule is not confined to the representatives of persons seised in fee of the inheritance as against the heir, but, being general, applies to every one who has an uncertain estate, if his estate determine, by the act of God, before severance of the crop. Com. Dig. *suprà*; Cru. Dig. tit. 3. s. 21, *et seq.*, last ed.; and accordingly the representative of a tenant for life is entitled to emblements in exclusion of the remainderman or reversioner.

If, however, A. be seised of land, and sow it, and then convey or devise it to B. for life, and remainder to C. for life, and B. die before the corn is reaped, the emblements shall go with the land to C.; *Grantham v. Hawley*, Hob. 135.; *Anon.*, Crd. El. 6.; and see *Knevet v. Pool*, Id. 464.; *Spencer's case*, Winch. 51.; *Co. Lit.* 55 *b.* Again, if A., seised in fee, sow land and convey it to B. for life, remainder to C. for life, and both B. and C. die before severance, the crop shall not go to the executors of either B. or C., but revert to A. See *Grantham v. Hawley*, *suprà*, Gilb. Ev. 215.; but see the cases *suprà*.

Tenant for a term determinable upon a life,

sowed the land in spring, first with barley, and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up; the clover so taken made the barley-straw more valuable, by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be paid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing. Held, that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and 2dly, because even if the plaintiff were entitled to one crop of a vegetable growing at the time of the cesser of his interest, this had been already taken by him at the time of cutting the barley. *Graves v. Weld*, 5 B. & Ad. 105.; 2 Nev. & M. 725.

A lease of lands contained a condition, "That if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared a bankrupt, or if he should become an insolvent or incur any debt on which any judgment should be signed, entered up, or given



against him, or on which any writ of *feri facias* or any other writ of execution should issue, it should be lawful for the lessor to enter into the demised premises, and the same again to have, repossess, and enjoy as in his former estate." The tenant gave a warrant of attorney, upon which judgment was entered up, and his goods taken in execution and sold, and a commission in bankruptcy afterwards issued against him. The lessor entered for the forfeitures. Held, that he was entitled to the emblements.

For further information on this subject the reader is referred to Co. Lit. 55 b.; 1 Roll. Abr. 728.; Oland's case, 5 Co. 116., Gilb. Ev. 208.; Bulwer v. Bulwer, 2 B. & Al. 470. Anon.; Cro. El. 61.; Davis v. Eyton, 7 Bingh. 154., and 1 Williams Ex. 562, *et seq.*, 3rd ed.

## SECTION III.

*Ecclesiastical Persons.*

*Quasi Tenants for Life.*— May devise Profits of growing Crops in case of Resignation.— If Parson die before Severance.

*Quasi Tenants for Life.*— ARCHBISHOPS and Bishops were formerly considered as tenants in fee simple of the lands which they held in right of their churches. As to rectors, parsons, and vicars, *Lord Coke* says, 1 Inst. 44 a., Id. 341 a. & b., Lit. s. 648., that for the benefit of the church and of their successors, they were in some cases esteemed in law to have a fee simple qualified; but to do anything to the prejudice of their successors, in many cases, the law adjudged them to have in effect, but an estate for life. Since the several statutes by which all ecclesiastical persons and corporations are restrained from alienation except by leases for three lives or twenty-one years, they are generally considered as *quasi* tenants for life only. Cru. Dig. tit. 3. ch. 1. s. 55.

As, therefore, the incumbent of a benefice is a tenant for life, his right to remove fixtures will, in a great measure, be governed by the rules and cases that have been already laid down and discussed

in the 3rd chapter in this book. Disputes, moreover, between ecclesiastical persons, can only arise with regard to mere ornamental fixtures.

It is said in Burn's Ecc. Law, that "If an incumbent enter upon a parsonage house in which there are hangings, grates, iron backs to chimneys, and such like, not put there by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall have them; but it seemeth that they shall continue in the nature of heirlooms: but if the incumbent fixed them there only for his own convenience, it seemeth that they shall be deemed as furniture or household goods, and shall go to his executor." See *antè*, p. 166.

The ornaments of a bishop's chapel pass to the successor, and not to the executor. *Carlisle* (Bishop's) case, 21 Ed. 3. 48.; *Corven's* case, 12 R. Co. 106.

It should seem, that a parson, or his personal representative, would have a reasonable time from the avoidance of the living, or the decease of the incumbent, to remove such ornamental fixtures; if, however, he resign his living, he cannot, it should seem, remove any thing affixed to the freehold. See *Bulwer v. Bulwer*, 2 B. & Al. 470.; *Betham v. Gregg*, 10 Bingh. 352.

#### *Emblements.*

*May devise Profits of Growing Corn.* — It is

enacted by the stat. 28 H. 8. c. 11. s. 6. that in case any incumbent before his death hath caused any of his glebe lands to be manured and sown at his own proper costs and charges, with any corn or grain, that then all the said incumbents may make and declare their testaments of all the profits of the corn growing upon the said glebe lands so manured and sown.

All tithes, fruits, oblations, obventions, commodities, advantages, rents, and all other revenues, casualties, and profits growing, rising, or coming due, during vacation, belong to the successor, except corn sown by the predecessor and not reaped by him, which the predecessor may bequeath. 28 H. 8. c. 11.; see 1 & 2 P. & M. c. 17.; and if he do not bequeath such corn it will go to his administrator. Swinb. p. 2. c. 11.

*In case of Resignation.* — But if the incumbent resign his benefice, he is not entitled to any emblements. *Bulwer v. Bulwer*, 2 B. & Ad. 470. If, however, he avoid his benefice in law by accepting another, he does not lose his right to the profits until he is actually deprived and the benefice become void *de facto*, as well as *de jure*, *Halton v. Cove*, 1 B. & Ad. 538. And if he be patron himself to the avoided benefice, and present thereto, the presentee is entitled to the profits from the time of presentation. *Betham v. Gregg*, 10 Bing. 352.

*If Parson die before Severance.* — If a person

sow his glebe land and die before severance, and after his successor is admitted, instituted, and indented before the corn is cut, it shall go to the executors and administrators of the deceased. Burn's Ecc. Law, 410., 9th ed.

The representatives of the deceased incumbent are entitled under the 4 & 5 W. 4. c. 22. to a proportion of the rents on leases which determine on the death of the incumbent, and to moduses, compositions, &c. becoming due at fixed periods by virtue of any instrument executed after the 16th June, 1834. So also are representatives entitled to a proportion, where the successor continues a composition made by his predecessor, and receives the whole from the last payment. *Williams v. Powell*, 10 East, 269.

Where there is a right to emblements, the law confers a right to enter, &c. to cut and carry away. Co. Lit. 55, 56. See Plowden's Queries, 239th.

## CHAPTER VIII.

*Of the Time when Fixtures should be removed, and the Liability to repair Injury caused by their Removal.*

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SECT. I. *As respects the Time of Removal.*

SECT. II. *As respects the Injury caused by Removal.*

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## SECTION I.

*As respects the Time of Removal.*

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*Time of Removal early established. — Whether since extended. — When Lease renewed. — Rule now settled. — Tenant may extend his Right. — Landlord's Consent. — Effect of a Declaration by Tenant not to abandon. — When Tenancy of uncertain Duration. — Executors of Tenant for Life. — When Tenancy determined by Act of Tenant. — Custom.*

*Time for Removal early established. —* THE limitation as to the period within which a *lessee* may remove fixtures was established, it will be recollected, so long back as Henry the Seventh's time. In the Year Book, 20 H. 7. 13. pl. 24., it was laid down, that "*durant le terme il peut remuer eux. Mais s'il souffert eux estre fixe al terre apres le fin del term, doneq'ils appeirt al lessor ;*" and this decision has been recognised and supported by a con-

tinued series of cases down to the present day. See Pool's case, 1 Salk. 368.; Exp. Quincey, 1 Atk. 477.; Dudley v. Ward, Ambl. 113.; Lee v. Risdon, 7 Taunt. 191.; Elwes v. Maw, 3 East, 38.; Buckland v. Butterfield, 4 Moore, 240.; Colegrave v. Dias Santos, 1 B. & C. 79.; Lyde v. Russell, 1 B. & Ad. 394.; Weeton v. Woodcock, 7 M. & W. 14.

*Whether since extended.* — But in the year 1801, the case of Penton v. Robart, 2 East, 88., 4 Esp. 33., came before Lord *Kenyon*, and from the observations of his Lordship it has been supposed that it was his intention to extend the time limited by the cases above cited. The facts of that case, however, were peculiar; for there the tenant remained in possession after the expiration of his term, and was in fact in possession at the time of the removal. Now the principle which was established in the Year Book above cited, viz. "that if he suffer them to remain fixed after the term, they belong to the lessor," has been explained by Lord *Holt* in Pool's case (1 Salk. 368.); viz. "that after the term they become a gift in law to him in the reversion." It is submitted that this rule is founded on the ground of abandonment, which never can arise so long as the tenant remains in possession, at least with consent of the landlord, which it would appear in Penton v. Robart the tenant had; for it will be recollected that the plaintiff had recovered judg-

ment in ejectment against him for these very premises; and as he had the power of turning him out under a writ of *Habere facias possessionem*, it must be assumed that he remained in possession with the plaintiff's sanction or consent. In this view of the case, therefore, *Penton v. Robart* cannot be considered as enlarging the rule.

But it is said that in the *Nisi Prius* report of this case, in 4 Esp. 33., Lord Kenyon says, "Where a tenant has by law a right to carry away any erections or other things on the premises which he has quitted, the inclination of my mind is, that he has a right to come on the premises, for the purpose of taking them away." Most clearly so, where the rule as to his abandonment is precluded, for the law is not so absurd as to confer a right, without affording a means of exercising that right. It is however submitted that his lordship never meant to apply this rule where it could be inferred from the tenant's conduct that the articles were left by him for the benefit of the landlord; and this is manifest from a question asked by his Lordship on the argument of the rule, which had been obtained to enter a verdict for the defendant, when the circumstances of the trial, and what he had then said, were fresh in his recollection; viz. "Whether, if he had left any personal chattel on the premises, as a hogshead of wine, he would not have been entitled to it after the term?" his Lordship surely would not have



put a question with reference to a case, in which the presumption of abandonment never could arise, if it were his intention at the time to apply the above observations to a case where the property had vested in the landlord, in consequence of such abandonment. But it is also to be observed, that his lordship only speaks of "carrying away," not of removing or severing, which shows that he considered that the tenant had previously exercised the right of ownership by removal, and therefore the presumption of abandonment could not be supposed to have arisen from his observation. In the report of the motion in 2 East, 91., his lordship says, "There is no pretence for saying that he had abandoned his right to them;" and he also says, "This is a description of property divided from the realty."

This case, therefore, is no authority for saying that a tenant may, after the expiration of his term, and after he has quitted, return to the premises and sever fixtures, which from his conduct had become a gift in law to his landlord.

*Where Lease renewed.* — But it may be said that Fitzherbert and Shaw, and some more of the cases above cited, show that if a tenant at the close of his term renew his lease, and acquire a fresh interest in the same premises, without reserving his right to remove those fixtures, which he had under the old tenancy a right to remove, he may lose his property in them altogether: to

which it may be answered, that those cases have reference to express contract, and if in the renewed lease a tenant neglect to reserve his rights, he may be supposed to have abandoned them to his landlord, unless he be permitted to show that a custom<sup>(a)</sup> prevails to the contrary, with reference to which he contracted.

*Rule now settled.* — Be this, however, as it may, the true ground, and that which has been contended for above, has in a recent case been laid down by Mr. Baron Alderson, viz. that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant. *Weeton v. Woodcock*, 7 M. & W. 14.

*Ecclesiastical Fixtures.* — It should seem that a parson, or his personal representative, would have a reasonable time from the avoidance of the living, or the decease of the incumbent, to remove fixtures. If, however, he resign the living, he cannot, it should seem, remove any thing attached to the freehold. *Bulwer v. Bulwer*, 2 B. & AL. 470.

*Tenant may extend his Right.* — As a tenant may by express contract vary his right to fixtures under the doctrine applicable thereto, so he may also extend the time for removing fixtures. See *Burn v. Miller*, 4 Taunt. 745. ; *Naylor v. Collinge*, *antè*.

(a) See *Wigglesworth v. Dallison*, 1 Leading Cases, *et notæ*.

*Landlord's Consent.* — Where the tenant has a right to remove the fixtures, and he wishes to leave them on the premises after the expiration of term, for the purpose of valuing them to the incoming tenant, or for any other purpose, it is requisite to have the consent of his landlord. For if the fixtures remain on the premises after the expiration of the term without such consent, the tenant loses his property in them. *Minshall v. Lloyd*, 2 M. & W. 450. ; and although subsequently severed by the landlord, and made chattels, the tenants right to them does not revive ; even when they are fixtures for domestic convenience, which the tenant might remove, such as bells, pulls, cranks, wires, &c. *Lyde v. Russell*, 1 B. & Ad. 394. But see the principle in *Beaty v. Gibbons*, 16 East, 166.

It would seem that if a tenant, in consequence of a verbal agreement with his landlord to purchase his fixtures, neglect to remove them during the term, he cannot be supposed to have abandoned them to his landlord. See *Hallen v. Runder*, 3 Tyrwh. 959.

*The Effect of a Declaration by Tenant of his Intention not to abandon.* — It has never been decided what would be the effect of a declaration by the tenant on quitting the premises, that he did not intend to abandon the fixtures to the reversioner.

It is submitted, however, that such a declaration would not affect his rights, unless, indeed, the land-

lord assented to the tenant's leaving them on the premises; because, it is the neglect of the tenant to remove the fixtures within the term, or in other words, the leaving them attached to the freehold, that has given rise to the doctrine of abandonment, and it cannot be competent to the tenant to avoid the effect of that law by a simple declaration, made perhaps against the will of the landlord. See *Master v. Roe*, 8 Ad. & E. 59.; but see *Beaty v. Gibbons*, 16 East, 116.

*Where Tenancy of uncertain Duration.*— There are cases in which, from the very nature of the tenancy, the lessee must have the privilege of removing fixtures after the termination of his interest: such as, where he holds under any uncertain term or contingency, as, for his own life, or the life of another, or upon the happening of any event. In such cases no presumption of gift arises; the property must still be in the tenant, for, the term closed by the act of God, or something equally uncertain. The tenant, therefore, could not remove them within the term, and he must have the right of removing them afterwards. Having this right, then, the law confers the means of exercising it. See tit. "Emblements," *antè*, which however must be done within a reasonable time. *Weeton v. Woodcock*, 7 M. & W. 14.\*

\* It is usual and advisable to provide for the removal of fixtures after the end of the term by a provision to that effect in the lease.

*Executors of Tenant for Life.*—The executors of a tenant for life have a reasonable time allowed them to remove fixtures after the death of their testator. See *Bulwer v. Bulwer*, 2 B. & Al. 470.

*When Tenancy determined by the Act of Tenant.*—When the landlord enters upon the tenant in consequence of his having forfeited his lease, the tenant cannot remove the fixtures. See *Storer v. Hunter*, 3 B. & C. 368.

*Custom.*—As to the effect of custom in a particular district, see *Wigglesworth v. Dallison*, 1 Dougl. 201. ; *Id.* 207. n. ; & 1 Leading Cases, *et notas*.

## SECTION II.

*As respects the Injury caused by Removal.*

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*Tenant bound to repair Injury.* — WHERE fixtures may be removed, and are accordingly taken down, it would seem the tenant is liable to repair any injury the premises may sustain by the act of removal. In *Foley v. Addenbrooke*, *antè*, p. 99., the Court said, “that the lessees have a right to remove them [certain articles referred to], doing as little damage as possible, and leaving the premises in a state fit to be used for a similar purpose by another tenant. 13 M. & W. 197, 198, 199. So it would be but reasonable, if a tenant remove a fixture for the purpose of substituting one of his own, that he should restore the former article, or substitute a similar one for it, on removing his own.

## BOOK II.

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### CHAPTER I.

*Of the Legal and Equitable Remedies in respect of Fixtures, and herein of the Time within which the Action must be brought.*

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#### *Of Remedies by Actions at Law.*

SECT. I. *Assumpsit.*

SECT. II. *Trover.*

SECT. III. *Trespass.*

SECT. IV. *Detinue.*

SECT. V. *Action on the Case in nature of Wds.*

SECT. VI. *Time within which Action must be brought.*

SECT. VII. *Of the Relief granted by Courts of Equity.*

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#### *Of Remedies by Action at Law.*

##### SECTION I.

###### *Assumpsit.*

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*When it lies. — Form of Declaration. — How described.*

THE preceding part of this work having been devoted to the consideration of the rights of the several parties possessing property in fixtures, it remains still to be ascertained what remedies

exist, as well at Common Law as in Equity, to enforce such rights.

*When it lies.* — Where there is any express or implied contract with reference to the purchase and valuation of fixtures, such contract may be enforced in this form of action; so also a party whose fixtures have been tortiously removed and converted may also sue in this form of action, waiving the tort.

*Form of Declaration.* — Where there is an entire contract to do several things of which the purchase of fixtures forms a part, it is not competent to the plaintiff to split the contract so as to recover in *indebitatus assumpsit* for the price of the fixtures, but he must declare specially on the contract. Thus, where, by an agreement between the plaintiffs and defendant, the latter was to accept an assignment of a lease of a farm from the plaintiffs, and to take the fixtures and crops at a valuation, and was afterwards let into possession of the fixtures and the crops valued to him, but the lease was never assigned, it was held, that *indebitatus assumpsit* would not lie for the price of the fixtures and crops, and that the plaintiffs' only remedy was by a special action on the agreement; *Lord Ellenborough* being of opinion that it was an entire agreement. *Neal et al. v. Viney*, 1 Campb. 471.

In *Hallen v. Runder*, the price of fixtures was recovered under an *indebitatus assumpsit* for



fixtures and effects bargained and sold. 3 Tyrwh. 959.

So in *Watson v. Salmon*, 4 Moore, 73., where a party had agreed to take fixtures at a valuation, and a valuation was accordingly made, it was held that the appraised value of the fixtures might be recovered on an account stated.

*How described.* — Fixtures ought not to be described as "goods." *Nutt v. Butler*, 5 Esp. 176.; *Lee v. Risdon*, 7 Taunt, 188. But see *Pitt v. Shew*, 4 B. & Al. 206.; and see also *Niblet v. Smith*, 4 T. R. 504., where a lime-kiln was described as goods and chattels in an action of replevin.

Where, in a declaration in assumpsit on a written agreement, for not permitting the plaintiff to take possession of certain apartments in the defendant's house, agreed to be let by him to the plaintiff in consideration of a certain annual rent, it appeared, by the agreement, that the fixtures in the rooms were specially enumerated therein:—Held, that an omission of the fixtures in the declaration, was no variance. *Ward v. Smith*, 11 Price, 19.

If an incoming tenant purchase fixtures belonging to the landlord, from the outgoing tenant, the former may recover the money so paid in an action for money had and received. *Robinson v. Anderson*. Peake, 129.

## SECTION II.

*Trover.*

*In what Cases it lies. — Fixtures must be severed. — During the Term. — When Lease forfeited. — Vendee cannot sue for Fixtures not mentioned in Deed of Sale. — Nor in Mortgage. — Where usually valued between outgoing and incoming Tenant. — Where Fixtures, being wrongfully removed, were sold under a Fi. Fa. — Tenant may maintain Action against Third Party. — By Mortgage. — Declaration for Goods, Chattels, and Fixtures good after Verdict. — Conversion.*

*In what Cases it lies.* — FOR the unlawful, or wrongful removal or severance of fixtures from the freehold, accompanied by their asportation or conversion, an action of trover may be maintained in order to recover their value. Bar. Abr. (A) "Trover."

In the first vol. of Chitty on Pleading, 7th ed., it is laid down that this action is confined to the conversion of goods or personal chattels. It does not lie for fixtures *eo nomine*, nor for injuries to land, or other real property, even by a severance of a part of what properly belongs to the freehold, unless there has also been an asportation. An incoming tenant, though entitled to the growing crops, cannot support trover against the out-

going tenant for taking them away. *Boraston v. Green*, 16 East, 77. 79.; *Davis v. Connop*, 1 Price, 53. But see *Davis v. Jones*, 2 B. & Al. 165.

“But if after the severance from the freehold, as in the case of trees, or fixtures, or earth, the property severed be taken away, trover may be

So if a tenant during his tenancy remove a dung heap, and at the time of so doing dig into and remove virgin soil, that is beneath it, the landlord may maintain trover for the removal of the virgin soil. *Higgin v. Mortimer*, 6 C. & Pa. 616.

*Must be severed.* — So long as fixtures are attached to the freehold, trover cannot be brought for the recovery of them. *Exp. Quincey*, 1 Atk. 478., per *Lord Harwick*. See *Lee v. Risdon*, 7 Taunt. 191.; *Davis v. Jones*, *supra* *Nutt v. Trotter*, 5 Esp. 176.

A lessee cannot, even during his term, maintain trover for fixtures attached to the freehold. *Mackintosh v. Trotter*, 3 M. & W. 186.

*During the Term.* — Nor even after his term, where he has neglected to remove them whilst his tenancy existed, and this, although they have been reduced to a chattel state by the landlord: therefore, where the yearly tenant of a house had, at his own expense, during his term, hung bells, but quitted the premises without removing them, it was held, that by remaining fixed to the free-

hold after the expiration of the term, they became the property of the landlord, and that the tenant could not maintain trover for them after the landlord had severed them from the freehold. *Lyde v. Russell*, 1 B. & Ad. 394.

*Where Lease forfeited.* — So where a lease was forfeited by the bankruptcy of the lessee, and the lessors entered upon the assignees in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee still continued in possession, and removed and sold a fixture put by the lessee for the purposes of trade, and the jury found that it was not removed within a reasonable time after the entry of the lessor: Held, that they had no right so to remove it, and that the lessor might recover it in trover. *Weeton v. Woodcock et al.*, 7 M. & W. 14.\*

Where the lessee of certain collieries assigned goods and chattels, and engines partly affixed to the freehold, the plaintiffs and the lessors afterwards took possession of the collieries by reason of a forfeiture. It was held, that the plaintiffs could not maintain an action of trover against the sheriff who had taken the engines under a *fi. fa.* against the lessee, inasmuch as the latter had not detached them. *M'Intosh v. Trotter*, 3 M. & W. 184.

*Vendor cannot sue for Fixtures not mentioned in*

\* *Semble*, such would have been the case even without such finding of the jury.

*Deed of Sale.* — Where a freehold mansion-house was sold by public auction without any stipulation on the part of the owner that the fixtures were to be taken and paid for separately, and the vendee who had paid the purchase-money entered into possession under the conveyance: Held, that the fixtures still remaining in the house, passed to the vendee of the freehold, and were not the subject of trover. *Colegrave v. Dias Santos*, 2 B. & C. 76., 3 D. & R. 255.

*Nor, in Mortgage.* — The lessee of a house containing fixtures executed an assignment of the premises by way of mortgage, not mentioning the fixtures. He afterwards assigned the premises, and all his estate and effects, to trustees. The trustees being in treaty for a sale of the fixtures, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused on demand to deliver the fixtures up. The trustees brought trover. Held, that they could not recover for the fixtures. *Longstaff et al. v. Meagoe*, 2 Ad. & E. 167. See *Mount v. Bell*, *antè*, p. 110.

*Where usually valued between outgoing and incoming Tenant.* — Certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between outgoing and incoming tenant. Held, that these

were the goods and chattels of the outgoing tenant, for which he might maintain trover. *Davis v. Jones*, 2 B. & Al. 165.\*

*Where fixtures, being wrongfully removed, were sold under a fi. fa.*—Where the owner of a mill demised it to a tenant for a term, and the latter clandestinely and without permission of his landlord dismantled the mill of the machinery, which, on its being removed, was seized by the sheriff under a *fi. facias*, and was sold under his authority to a *bonâ fide* purchaser: Held, that the landlord might maintain trover against such purchaser, though the tenant's term was unexpired. *Farrant v. Thompson*, 5 B. & Ald. 826.; 2 D. & R. 1.

G., the owner of the fittings of a public house, demised them to D., who thereupon became tenant of the house to a third party under an agreement which gave his landlord a lien on the fittings. G. was present at the execution of such agreement. D. afterwards sold the good-will and fittings, without G.'s knowledge or consent, to W., who, being told by the landlord that D. was his tenant, bought them *bonâ fide* in ignorance of G.'s title. Held, that G. could not maintain trover for the fittings against W., and that the defence was admissible on the plea of "not possessed." *Gregg v. Wells*, 10 Ad. & E. 90., 2 Per. & D. 296.

\* The outgoing tenant had the permission of the landlord to leave them on the premises.

*Tenant may maintain Action against Third Party.*

—A tenant has during the term a sufficient interest in the fixtures which belong to his landlord to entitle him to maintain trover against a third party who wrongfully removed them, although at the end of the term he may be bound to leave them for the use of the landlord. *Boydell v. M<sup>c</sup>Michael*, 1 C. M. & R. 177.

*By Mortgagee.*—So also the mortgagee of a lease under which the tenant (the mortgagor) was bound to leave the fixtures behind him after the lease expired, for the use of the landlord, was held to have such an interest in the fixtures erected before the mortgage, as would maintain trover against the assignee of the mortgagor, for removing the fixtures. *Hitchman v. Walton*, 4 M. & W. 416.; or he may maintain trespass for them. See Lord Abinger, *id.* 414.

*Declaration for Goods, Chattels, and Fixtures good after Verdict.*—The word fixtures does not necessarily mean things affixed to the freehold; and therefore, in an action of trover for goods, chattels, and fixtures, where damages were assessed generally on the whole declaration: It was held, that it must be intended after verdict, that the jury had not awarded damages in respect of fixtures attached to the freehold. *Sheen v. Ritchie*, 5 M. & W. 175.; 3 Jur. 607.; *Sheen & Evans*, 7 Dowl. 335.

*Conversion.*—If the reversioner, having refused while off the premises to allow a tenant to remove

a wooden barn resting upon a brick foundation by weight alone, afterwards, while a third party is in possession of the land, come on the land and prevent the tenant from entering to take the barn away; this is a conversion by the reversioner. *Wansbrough v. Maton*, 4 A. & E. 884., 6 Nev. & M. 369.

The forcible taking possession of a house and fixtures by the assignee of a term in the house, is not a conversion of such fixtures. *Longstaff v. Meagoe*, 4 Nev. & M. 211.

The severing of a thing from the freehold, as the taking down the door of a house, is not a conversion, for a conversion can only be of a personal chattel. *Wood v. Smith*, Cro. Jac. 129.

For further information as to the declaration, pleading, and proof, see the different works on these subjects.



## SECTION III.

*Of Trespass.*

*Where Action lies. — Possession requisite. — Who may sue. — Tenant cannot be sued during the Term. — De Bonis asportatis by Landlord. — Where Severance and Asportation one continuous Act. — Who has the Property in Materials of a Bridge dedicated to the Public. — Whether Tenant loses his Property in Fixtures on Severance. — Trees. — Declaration.*

*Where Action lies.* — WHERE fixtures have been severed from the freehold, they may form the subject of an action de *De bonis asportatis*, but where they remain annexed to the freehold, the same rules will apply as if the action of trespass had been brought for an injury to the real property.

*Possession requisite.* — The gist of this action is the injury to the possession, and the general rule is, that unless at the time the injury was committed the plaintiff was in the actual possession, trespass cannot be supported. *R. v. Watson*, 5 East, 485. 487.

*Who may sue.* — And therefore, although a tenant may during his term bring an action of trespass against his landlord or a stranger, for the removal of fixtures attached to the freehold, because, he has the actual possession at the time of the trespass; see

*Pitt v. Shew*, 1 B. & Al. 206.; *Twigg v. Potts*, 1 Cr. M. & R. 89., 3 Tw. 969.; yet for this reason the landlord cannot in such case maintain this action for such injury; it must be brought in the name of the tenant.

*Tenant cannot be sued during Term.*—So neither can he sue the tenant in trespass for the wrongful removal of fixtures from the freehold during his term.

*De Bonis asportatis by Landlord.*—But as the general property of chattels personal draws after it the legal possession, the person having such right of property may maintain trespass *De bonis asportatis*, for the removal of fixtures from the freehold, which thereby become mere personal chattels, and immediately vest in the landlord.

*When Severance and Asportation one continuous Act.*—It has however been doubted whether the landlord can maintain such action when the severance and asportation are one continuous act. See *Udal v. Udal*, Aleyn, 82.; *Berry v. Beard*, Palmer, 327. But it must be recollected, that on the severance of fixtures, they become personal chattels, and vest immediatly in the landlord, who then acquires the right of possession, which is sufficient to maintain an action of trespass; and that it is this injury which confers the right of action, and not the asportation.

*Who has the Property in Materials of a Bridge dedicated to the Public.*—In *Harrison v. Parker*,

*et al.*, 6 East, 154., it appeared that A. granted liberty, licence, power, and authority to B. and his heirs to build a bridge on his land, and B. consented to build the bridge for public use, and to repair it, and not to demand toll; and it was held, that the property in the materials of the bridge, when built and dedicated to the public, still continued in B., subject to the right of passage by the public; and when severed and taken away by a wrong doer, he may maintain trespass for the asportation.

*Whether Tenant loses his Property in Fixtures on Severance.*—In *Pitt v. Shew et al.*, 4 B. & Al. 206., the tenant was allowed to recover in trespass for the wrongful removal of fixtures under a distress warrant; however, it is doubtful whether this case can be considered law, for the tenant lost his property in the fixtures on their severance, they having then vested in the landlord; yet it might be answered, that the landlord would be estopped from saying that the property had vested in him in consequence of his wrongful act. It is nevertheless conceived that the tenant would be entitled to recover damages for the act of severance. See *Twigg v. Potts et al.*, 3 Tyr. 969., which was an action of trespass for removing under a distress for rent, certain fixtures belonging to a blacksmith, viz. bellows, anvils, and blocks, vices, lathes, shelves, grates, grindstones, and benches.

*Trees.*—Where trees are excepted in a lease, the lessee has no interest therein, and cannot sue even a stranger for cutting them down, though he might for the trespass to the land; and in such case the lessor may support trespass against the lessee or a stranger, if he either fell or damage them; but if there be no exception of the trees in the lease, the lessee has a particular interest therein, and may support trespass against the lessor or a stranger for an injury to them during the term; but the interest in the body of the trees remains in the lessor as part of his inheritance, and he may support an action on the case against a lessee or a stranger for an injury thereto, or even trover if they be cut down and carried away. 1 Saund. 322., n. 5.; *Gordon v. Harper*, 7 T. R. 13.; Com. Dig. tit. “Biens;” *Athersoll v. Stevens*, 1 Taunt. 190—194.; *Blackett v. Lowes*, 2 M. & S. 498.

*Declaration.*—In a declaration in trespass for taking the plaintiff’s goods, chattels, and effects, it was held that the value of fixtures might be recovered under these terms. *Pitt v. Shew*, 4 B. & Al. 206.; see *Dalton v. Whittem*, 3 Q. B. 961.; *Hogan v. Jackson*, Cowp. 304.

For further information on the pleadings in this form of action, and the proof, the reader is referred to the several works on these subjects.

## SECTION IV.

*Detinue and Replevin.*

As, on the instant of severance of fixtures (the tenant's qualified property in them being determined) they vest absolutely in the landlord, it should seem that he may sue in detinue to recover, not only the possession of them, but damages for their detention.

*Replevin.*—Replevin can only be supported for taking personal chattels, and not for taking things attached to the freehold, and which are in law considered fixtures; 2 Saund. 84.; Niblet v. Smith, 4 T. R. 504.; and cannot be delivered to the distrainer upon a writ of *retorno habendo*. Hence it does not lie for trees or timber growing. The general rule is, that replevin lies for any thing that may by law, be distrained. Bac. Abr., "Replevin and Avowry" (F); Com. Dig., "Replevin," (A); 1 Chitt. on Pleading, 182.

This would seem to be doubtful, for fixtures on their severance become to all intents and purposes goods and chattels, and may be sued for in trespass as such: after the act of severance they no longer partake of their real character.

## SECTION V.

*Action on the Case in nature of Waste.*

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*Old Writ of Waste.* — *By whom brought.* — *Tenant in Tail after Possibility.* — *Against whom brought.* — *Executor of Lessee.* — *Action abolished, and Case substituted.* — *Who may sue.* — *Where Action lies.*

*Old Writ of Waste.* — FORMERLY the remedy for injuries to the freehold committed by particular tenants was by writ of waste, and this, whether committed upon the land itself, or upon a personal chattel which had been annexed to the freehold, such annexation having the effect of so completely identifying the chattel with the land, as to cause it to be considered part and parcel of the freehold. Co. Lit. 53 a.; 2 Saund. 259. n. 11., 6th ed.

*By whom brought.* — This action could only be brought by him who has the *immediate* reversion, or remainder in fee or in tail, to the disinheritance of whom the waste is always alleged to have been committed. Co. Lit. 53 a.; 2 Rol. Abr. 829.; Cro. Jac. 688. See Moor, 387., 5 Rep. 76., Jones, 51.

So if a lease for life be made remainder for

years, the reversioner or remainderman may bring the action, notwithstanding the mesne remainder. Co. Lit. 54 a.; 2 Inst. 301.

*Tenant in Tail after Possibility.*—It is held that tenant in tail after possibility cannot have the action, for in effect he is only tenant for life. 2 Rol. Abr. 825. pl. 5.; Co. Lit. 53 b. Nor can any person maintain this action unless he had an estate of inheritance *at the time when the waste was committed*; and therefore it does not lie by an heir for waste done in the life of his ancestor. 2 Inst. 305.; see also Bacon v. Smith, 1 Q. B. 345., 4 P. & D. 652., and 2 Saund. 252 a., n. h, 6th ed. Nor by the grantee of a reversion for waste done before the grant to him. 2 Saund. 252. n., 6th ed.

*Against whom brought.*—At common law this action lay only against tenant by the courtesy, tenant in-dower, or guardian. But by the statute of Gloucester (6 Ed. 1. c. 5.) the action was given against lessee for life or years, or tenant *pur autre vie*; 2 Inst. 301.; or against the assignee of tenant for life or years, for waste done after the assignment. Sanders v. Norwood, Cro. El. 683.

*Executor of Lessee.*—If a lessee for years commit waste and die, an action of waste will lie against his executors or administrators. But the executors or administrators of a tenant for years are punishable for waste done while they are in

possession. 2 Inst. 302.; 1 Cru. Dig. tit. 8. ch. 2. s. 11.

*Action abolished, and Case substituted.*—This action having become obsolete, it was finally abolished by the 3 & 4 W. 4. c. 27. s. 36., and an action on the case in nature of waste has been substituted for it. Upon the advantages derived from the establishment of this form of action, Mr. Williams, in his able note to the case of *Greene v. Cole*, 2 Saund. 252 a., says, "That the plaintiff derives the same benefit from it as from an action of waste in the *tenuit*, where the term is expired, and he has got possession of his estate, and consequently can only recover damages for the waste; and though the plaintiff cannot in an action on the case recover the place wasted when the tenant is still in possession, as he may do in an action of waste in the *tenet*, yet this latter action was found by experience to be so imperfect and defective a mode of recovering seisin of the place wasted, that the plaintiff obtained little or no advantage from it; and therefore, where the demise was by deed, care was taken to give the lessor a power of re-entry in case the lessee committed any waste or destruction, and an action on the case was then found to be much better adapted for the recovery of mere damages than an action of waste in the *tenuit*. It has also this further advantage over an action of waste, that it may be brought by him in reversion or remainder for life



or years, as well as in fee or in tail\*, and the plaintiff is entitled to costs in an action on the case, which he cannot have in an action of waste, who may sue where a lessee for years mortgaged his lease and all his estate and interest in the premises, and afterwards became bankrupt. Held, that the mortgagee might declare in case as reversioner against the assignee of the tenant for the removal of fixtures from the premises whereby they were dilapidated and injured. *Hitchman v. Walton*, 4 M. & W. 409.

An action on the case for waste, or for severing fixtures, may be brought by the executor of the reversioner or party injured thereby, when such acts have been committed within six calendar months previous to his decease, provided the action be brought within one year after the decease. 3 & 4 W. 4. c. 42. s. 2.

\* "But it must be observed that in Co. Lit. 536., it is said: —'Note, after waste done there is a special regard to the continuance of the reversion in the same state that it was at the time of the waste done.' And the action of waste is there said to 'consist in privity.' The passage indeed has reference to the old form of action, but the rule applies equally to an action on the case in the nature of waste.' *Bacon v. Smith*, 1 Q. B. 349., per *Pattison J.* Accordingly, where A. and his wife being seised of a messuage for their joint lives and the life of the survivor, all the estate and interest of A. became vested in the defendant, who permitted waste during A.'s lifetime, it was held that the wife who survived her husband could not maintain an action on the case against the defendant in respect of such waste. *Id.*"

*When Action lies.*—The action on the case may be brought for permissive waste as well as for voluntary.\* And where the lessee even covenants not to do waste, the lessor has his election to bring either action on the case, or of covenant against the lessee for waste done by him during the term. *Kinlyside v. Thornton*, 2 Bl. Rep. 1111.

This subject is most fully discussed in 2 Saund. Rep. 252., *et seq.* ; in Chitty on Pleading, 157. ; and see 2 Id. n. l. ; where also the forms of declaration and other pleadings will be found ; and see also *Kinlyside v. Thornton*, *suprà* 1 H. Bl. 258., 3 East, 38., 1 B. & B. 54.

For the evidence to support this action, see Phil. on Ev., Stark. on Ev., and Ros. on Ev., &c.

\* It has been doubted whether an action on the case can be maintained for permissive waste against any tenant for years. See *Gibson v. Wells*, 4 Taunt. 764. ; *Herne v. Bembow*, 7 Taunt. 392. ; *Jones v. Hill*, 1 Moore, 100. ; and see 2 Saund. 252 b. n. i. ; 1 Chit. on Pleading, 158.

## SECTION VI.

*Time within which Action must be brought.*

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AN action of trover, trespass, or detinue, for taking away, converting, or detaining articles severed from the freehold, which are goods and chattels, may be maintained by the executors of the party entitled thereto, at any time within six years after the act committed. 4 Ed. 3. c. 7. But if the party wrongfully severing a fixture die, no action can be maintained against either for the injury to the land, or for the recovery of the thing severed, unless the injury was committed within six calendar months before his decease, and the action be brought against his executors or administrators within six calendar months after they shall have taken upon themselves such characters respectively, and the damages when recovered will be payable as simple contract debts of the deceased. 3 & 4 W. 4. c. 42. s. 2.

*Case.*—An action on the case in the nature of waste for an injury to the reversion, or for severing fixtures and the like, which are injuries to real property, may be brought by the executors of the reversioner or party injured thereby, where such acts have been committed, within six calendar months previous to his decease. *Id.*

## SECTION VII.

*Of the Relief granted by Courts of Equity.*

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*Advantages of Injunction over Action at Law. — Timber. — Property must be affixed. — Dove-cote. — Privity of Estate. — Actual Waste. — Right doubtful.*

*Advantage of Injunction over Action at Law. —* THE redress by action at law for any injuries done to the freehold by the removal of fixtures, being of a remedial nature, slow and inadequate in its results, the courts of equity have afforded one of a preventive nature by injunction, whereby the progress of injuries of this description to real property may be anticipated, and by timely interference put a stop to. The great advantage that this proceeding has over an action at law is, that it offers a prompt and efficacious mean of preventing a tenant from committing waste on the premises; whereas an action at law only compensates for the injury actually sustained, and that too by pecuniary damages which are by no means equivalent to the loss incurred. And where waste has been already committed, this court will restrain the continuance of it, and also grant an account, and decree satisfaction for the waste committed. See *Jesus' College v. Bloome*, 3 Atk.

262.; in which respect it is equally efficacious with an action at law.

*Timber.*—So the Court will restrain the carrying away of timber which has been cut down. 1 Ves. J. 93.

*Property must be affixed.*—But it must appear clear that the property in dispute is affixed to the freehold. See *Kempton v. Eve*, 2 Ves. & Bea. 349., per *Lord Hardwick*.

*In what Cases the Court will interfere.*—The Court of Chancery will, at the instance of the owner of the inheritance, or of the remainderman for life, as also of the remainderman in fee, although there is an intermediate estate for life, restrain a tenant for life or years from committing waste.

An injunction will in some cases issue against a stranger where the damage contemplated is of an irreparable nature, and of long continuance. *Coulson v. White*, 3 Atk. 21.

*Tenant for Life without Impeachment of Waste.*—Injunction refused to restrain the father, who was tenant for life without impeachment of waste, from removing a wood floor he had placed, and young oak trees he had planted, breaking up meadow land, &c. To ground such an injunction there must be waste and spoliation, and no delay in applying for it. *Piers v. Piers*, 1 Ves. 521.

*Dove-cote.*—Waste is committed by destruction

of dove-cote, but not by removing presses, &c., unless fixed. *Kempton v. Eve*, 2 Ves. & Bea. 349.

*Privity of Estate*.—The interference of the Court is based on privity of estate between the reversioner and the tenant.

*Actual Waste*.—The Court, however, will not grant an injunction on slight or uncertain grounds, and there must be an actual waste, or some act from which the intention is fully evinced. *Gibson v. Smith*, 2 Atk. 183.; *Jackson v. Cater*, 5 Ves. 688.; 7 Id. 309.; 10 Id. 54.; 6 Id. 706.; *Dick*, 101.; 1 Jac. & W. 653.; *Barn*, 497.

*Right doubtful*.—Where the right is doubtful, the Court will restrain tenant until the right be determined at law. *Sunderland v. Newton*, 3 Sim. 450.

It will be quite unnecessary in a work of the present nature to continue this inquiry further; the reader is referred to *Eden on Injunctions*; *Com. Dig.*, tit. "Chancery," and the several other Digests.

## CHAPTER II.

*Of the Application of the Criminal Law to Fixtures.*


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*Not subject of Larceny at Common Law.—Legislative Provisions.—When Possession obtained with intent to steal under an Agreement.*

*Not subject of Larceny at Common Law.*—At common law, fixtures are not the subject of larceny. The severance of things attached to the freehold, with intent to steal and carry them away, was not therefore considered a felony of which land could not be the subject; nor, by consequence, that which was annexed to it, which could have no existence as distinct from the land, and so incapable of being stolen. 1 Hale, P. C. 510.; 2 East, P. C. 587. Unless indeed the thief after severance allow it to remain some time on the premises, and then take it away. See 4 Bl. Com. 232.; Lee v. Risdon, 7 Taunt. 190.; Colgrave v. Dias Santos, 2 B. & C. 80., per Bayly, J.

*Rule laid down.*—The criminal law commissioners, in their Report, p. 11., thus state the rule: "Although a thing be part of the realty, or be any annexation to or unsevered produce of the

realty; yet if any person sever it from the realty with intent to steal it, after an interval which so separates the acts of severance and removal that they cannot be considered as one continued act, the thing taken is a chattel, the subject of theft, notwithstanding such previous connection with the realty. If any parcel of the realty, or any annexation to, or unsevered produce of the realty, be severed otherwise than by one who afterwards removes the same, it is the subject of theft, notwithstanding it be stolen instantly after that severance."

*Where Possession obtained under an Agreement with intent to steal.*—Where a person obtained possession of a house fraudulently, and with intent to steal fixtures, under a written agreement for a lease, and stripped the lead from the house, it was held that he was guilty of felony for so doing. *R. v. Munday*, 2 Leach, 859.; 2 East, P. C. 594.

*Legislative Provisions.*—But now, by legislative enactment, larceny may be committed of fixtures, although there be no interval between severing and removing them. The 7 & 8 G. 4. c. 29. s. 44. enacts, that "If any person shall steal, rip, or break with intent to steal, any glass or woodwork belonging to any building, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building, or anything made of metal fixed in any land being



private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place, dedicated to public use or ornament, he shall be deemed guilty of felony, and upon conviction shall be liable to be punished in the same manner as in the case of simple larceny."

*Where Fixtures broken or destroyed.* — And sec. 3. provides for the unlawful and malicious cutting, breaking, or destroying, or damaging with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable (used for the manufacture of silk, &c.), or for the forcible and malicious entry into any house, &c., with the intent to commit any of the offences aforesaid, and makes such offences felony, and subjects the felon on conviction to transportation or imprisonment, and if a male, to the additional punishment of whipping.

And by the 4th sec. similar offences are provided for, when "committed in respect of any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatever (other than those in the 4th sec.), and the punishment is transportation, or imprisonment and whipping.

In a case where the owner had taken the machine to pieces, and broken the wheel, so that it could not be worked, it was held that such case was not within the statute. *West's case*, 2 Bea Dig. C. L. 1518.

*Cases within Statute.*—Where, however, the machine had been taken to pieces, and was in different places, but only requiring the carpenter to put the pieces together again; such case was held to be within the statute. Mackarel's case, 4 C. & Par. 448.; and see Bartlet's case, 3 Dea. Dig. C. L. 1517.; Chubb's case, Id. 151.; Fidler's case, 4 C. & P. 449.

*Deodands.*—The law of deodands does not apply to anything having the character of realty. It does not, therefore, affect fixtures, which are identical with the freehold itself; and consequently if an article which is affixed to the realty cause the death of a party, it cannot be forfeited. Thus it was held that a church bell was not forfeited, the rope having drawn up and strangled the man whilst ringing it. Axminster case, 1 Sid. 207.; Keb. 723.

But where the chattel had been severed from the freehold before the accident, then it becomes forfeited; thus, if a bell fall from a steeple, or the stone from a mill. Id.

When the sail of a windmill, the wheel of a forge or mill, or a millstone, occasion a death, they cannot be forfeited. 6 Mod. 187.; T. Raym. 97.; 3 Inst. 57.; Keb. 745.

## CHAPTER III.

*Of the Survey and Valuation of Fixtures.*


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SECT. I. — *When the Survey may be made, and the Mode of making it.*

SECT. II. — *Stamps on Survey and Valuation.*

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## SECTION I.

*When the Survey may be made, and the Mode of making it.*

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*Between Landlord and Tenant. — Where Allowance to be made at End of Lease. — Where new Fixtures substituted for old. — Between outgoing and incoming Tenant. — Custom. — Landlord ought to be Party to Agreement. — Landlord's Consent.*

*Between Landlord and Tenant.* — THE demise between landlord and tenant generally provides for the taking of the fixtures at a valuation, and on such occasions the broker should value such articles, as a tenant would in ordinary cases be entitled to remove under the law of fixtures if he had erected them himself during the term.

*Where Allowance to be made at End of Lease.* — And where the landlord is to make an allowance for the fixtures at the termination of the lease, those articles only should be valued which were

paid for by the tenant at the commencement of the term, or, at all events, those which, during the term, had been substituted for others which previously were attached to the premises. However, the rule to be observed on these occasions is, that strict attention should be paid to the meaning of the parties as expressed, or as collected from their agreement.

*Where new substituted for old.* — If a tenant put up new fixtures in the place of those which are worn out and incapable of further repair, he would be entitled to remove them at the end of the term.

*Between outgoing and incoming Tenant.* — The rights between these parties are generally governed by the same rules as those which apply between landlord and tenant. See *antè*, p. 218.

Where there is an agreement between outgoing and incoming tenant to take fixtures at a valuation, such as would be removable between the landlord and tenant only, should be valued, including those of course, which the outgoing tenant had purchased (if any) of the landlord. But such articles as the tenant cannot legally remove ought not to be inserted in the valuation, nor can he seek an allowance for them even though erected by himself at his own expense. Such things of course ought not to be inserted in the appraisement as were affixed previous to the outgoing tenant having taken possession of the premises, unless he

had purchased them of the landlord, nor such things as would be contrary to the terms of the demise, nor things affixed to the premises prior to the demise to the first tenant, if not purchased by him of his landlord.

If the incoming tenant purchase any article which the outgoing tenant could not legally sell, he may recover its value in an action for money had and received. *Robinson v. Anderson*, Peake's N. P. C. 129.

*Custom.*—The custom of the country may always be safely relied on in ascertaining what fixtures may be valued between incoming and outgoing tenant. *Davis v. Jones*, 2 B. & Al. 165. See *Watherall v. Howells*, 1 Campb. 277.

*Landlord ought to be Party to Agreement.*—It is advisable in all such agreements as these, to make the landlord a party, as he will then be prevented from afterwards insisting that, as the fixtures were not removed during the term, they fell in with the lease, and that the incoming tenant took them as part of the demised premises, and cannot remove them. See *antè*.

*Landlord's Consent.*—If the tenant wish to leave the fixtures on the premises after the term, it is advisable to have the consent of the landlord. See *Minshall v. Lloyd*, 2 M. & W. 450.

## SECTION II.

*Stamps on Survey and Valuation.*

THE 55 G. 3. c. 184., commonly called the Stamp Act, requires a 2s. 6d. stamp on the appraisement or valuation of fixtures, if the amount of the valuation do not exceed 50*l.*; if above 100*l.* and under 200*l.*, a duty of 10*s.*; if above 200*l.* and under 500*l.*, a duty of 15*s.*; and if above that sum, 1*l.*; and an appraisement stamp is sufficient, an award stamp is not required. *Leeds v. Burrows*, 12 East, 1.

If indeed the appraisement be intended for mere information, and not to found a contract, then it requires no stamp. *Atkinson et al. v. Fell et al.*, 5 M. & S. 240.; *Jackson v. Stopherd*, 2 C. & M. 361.

A stamped inventory of fixtures signed by the brokers appointed by the parties to appraise them will be evidence of an account stated, without proof of the contract for the sale of the articles, or their value. *Salmon v. Watson*, 4 Moore, 73

## BOOK III.

## DILAPIDATIONS.

## CHAPTER I.

*Of Dilapidations in general.*

*Definition. — Tenant's Obligation. — Common Law Rule. — Different Kinds of Waste. — Voluntary Waste. — Permissive Waste. — Nature and Extent of Liability. — Of what Waste may be committed. — Between whom Liability exists.*

*Definition.* — DILAPIDATIONS or waste may be defined to be the act or default of the party having a usufructuary interest in the lands or tenements of another, by which the property of that other is injured or deteriorated.

Bacon defines it to be the committing of any spoil or destruction in houses, lands, &c. by tenants, to the damage of the heir, or of him in reversion or remainder. 8 Bac. Abr., tit. "Waste," 379., 7th ed.

In Les term des la Ley, tit. "Waste," it is said: "Waste is, when tenant for terms of years, tenant, for life, tenant for term of another's life, tenant in dower, tenant by the courtesy, or guardian in chi-

valry, doth make waste or destruction on the lands; that is to say, pulls down the house, or cuts down timber, or suffers the house willingly to fall, or digs the ground."

And Blackstone, 2 Com. ch. 18., says, "Waste is a spoil or destruction in houses, gardens, or trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail.

Whenever there is a particular or limited estate in lands or tenements which must after the determination of such estate devolve upon another, any defect in their condition is properly dilapidation, and the act of permitting or committing such defect is called waste.

*Tenant's Obligation.*— And the tenant is bound to use the property in such a manner, and with such care, as not to injure the reversion, so that it may come to the owner in the same state as when the tenant obtained the possession of it; and this, because, he is not the absolute owner, but has merely a right of user, and is therefore answerable for the mode in which he treats the premises whilst his interest exists, and, it is but just and reasonable that the reversioner should expect that the property should return to him at least in the same state as when he demised it, without waste or dilapidation, an obligation which the law will enforce the observance of, by an action at the suit of the reversioner, for the recovery from the tenant of



compensation in damages for the loss sustained by reason of his acts, whether of commission or omission, unless indeed in those cases where the premises are let, and the landlord receives a remuneration in the shape of rent, when he is bound to allow for such dilapidation and decay as may be produced by, and are the natural consequences of, wear and tear, the lapse of time, and the effects of the weather.

*Common Law Rule.*—The principle upon which the common law acts in casting this obligation upon the occupier or tenant, is, that he should endure the burden who derives the advantage, “*Qui sentit commodum sentire debet et onus*,” as well as the injustice which must result from allowing the expense of accumulated dilapidation to fall upon the landlord at the end of the tenancy, when a small outlay by the tenant in the first instance would have prevented any such expense becoming necessary: besides, the tenant is the fitter person to guard against decay, in consequence of the opportunity afforded him of observing from time to time the state of the premises.

*Several kinds of Waste.*—Waste may be either voluntary or actual, permissive or negligent.

*Voluntary Waste.*—The former may be incurred by acts of commission, the latter by acts of omission. Thus it is voluntary waste to pull down or prostrate houses, or cut down timber trees. See Bac. Abr., tit. “Waste” (B).

And indeed voluntary waste may be committed by making an alteration in the tenement, although its value be thereby increased, for it may have the effect of casting an additional obligation on the reversioner, and he may by no means consider it an improvement: besides, the power of making an alteration does not arise or spring out of a mere right of user; and it is incompatible, therefore, with his interest, for a tenant to make any alteration or improvement, unless, he is justified in doing so by the express stipulation of his covenant. See *London v. Greyme*, Cro. Jac. 182.; *Cole v. Green*, 1 Lev. 309. But that cannot be waste which is not prejudicial to the inheritance. Bac. Abr., tit. "Waste" (C).

*Permissive Waste.* — Permissive or negligent waste may consist in the neglect to supply those dilapidations which are the necessary effects of time and use, or those which are merely occasional or accidental. Thus it may be incurred by suffering houses to be uncovered, whereby the spars or rafters, planks, or other timber of the house become rotten. Bac. Abr., tit. "Waste" (B).

*Nature and Extent of the Liability.*—As the law which imposes the necessity of guarding against dilapidations is founded on the mere right of user, the nature and extent of the repairs to which different tenants are liable will depend not only upon the nature of the tenancy, but also upon the thing used, as well as upon the express stipula-

tions of the parties in determining questions of this nature: these will be found to form the correct ground for consideration (although it may appear that some of the cases on the law of dilapidations turned upon the principle of benefit and advantage resulting from the user and occupation to the grantee), and fairly so, for it would be most unjust that a tenant-at-will, or from year to year, should be liable to the same obligations as a tenant under a long term of years.

*What Waste may be committed.*—Waste may be committed not only in lands and houses, but in gardens and orchards, timber trees, dove-houses, warrens, parks, fish-ponds, and other subjects of property. Bac. Abr., tit. "Waste" (C 4.).

*Between whom Liability exists.*—Questions as to the manner in which lands or tenements should be used, arise between persons who have different estates in the same lands, &c., founded on a privity of interest: thus, between the incumbent of a benefice and his successor, between tenant for life and the remainderman, between landlord and tenant.

Of these in their respective order: and first, of Ecclesiastical Dilapidations.

## CHAPTER II.

*Ecclesiastical Dilapidations.*


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SECT. I. *Of the Right to repair the Edifice of the Church.*

SECT. II. *Of the Right to repair the Parsonage House, and other Buildings, and herein of Fences, &c., Timber.*

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## SECTION I.

*Of the Right to repair the Edifice of the Church.*

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*What are Ecclesiastical Dilapidations. — Incumbent's Obligation. — Reasons thereof. — Who liable to the Repairs of the Church. — Rectors and Vicars. — Lay Impropriator. — Repair of Chancel discharges Obligation to repair Church. — Parson may cut down Timber. — The Nave or Body of the Church. — Exemption. — Union of Churches. — District Churches. — Chapels of Ease. — Chapels not District Churches. — Ornaments of the Church. — Monuments. — Defacement of. — Pews.*

*What are Ecclesiastical Dilapidations. — DILAPIDATION (dilapidatio) is where an incumbent on a church living suffers the parsonage house or outhouses to fall down or lie in decay for want of necessary reparation; or, it is the pulling down or destroying any of the houses or buildings belonging to a spiritual living, or destroying of the woods, trees, &c. appertaining to the same; for*

it is said to extend to the committing or suffering any wilful waste in or upon the glebe, woods, or other inheritance of the church. Degge's Parson's Counsellor, B. i. c. 8.

Blackstone, in his commentaries, vol. ii., says, dilapidations are a kind of ecclesiastical waste, either voluntary, by pulling down, or permissive, by suffering the chancel, parsonage house, and other buildings thereunto belonging, to decay. See Ayliffe Parer, 217.; Godol. Abr. 173.

*Incumbent's Obligation.* — The incumbents of ecclesiastical livings, being mere tenants for life (see *antè*, p. 176.), are enforced, under pain of the civil remedies hereafter mentioned, to repair, and keep in a good and sufficient state, the houses, chancel of the church, glebe, woods, or other inheritance of the church, and so transmit them to their successors; for, were it otherwise, the benefice must inevitably become decayed, to the detriment, loss, and injury of the successor or the patron, and the law therefore casts upon the incumbent the obligation to do even ordinary repairs.

*Reasons thereof.* — The peculiar nature of the incumbent's interest in the living, naturally places him under this obligation; for, were he not under the necessity of providing for dilapidations, there is no other person who would, there being no reversioner who could be called on for contribution.

Besides, he exercises a purely beneficial ownership over the estate; he has no liabilities in respect of either rent or covenants; and it is therefore but reasonable and fair that these duties should devolve upon him.

Leaving the subject of dilapidations with reference to palaces, houses, and other edifices and buildings belonging to ecclesiastical benefices and livings for the present, and taking the edifice of the church first in order, the inquiry will be—

*Who are liable to the Repairs of the Church? —*

Anciently the bishops applied a fourth part of the tithes of the diocese to the repairs of the church; from this obligation they absolved themselves by a release of this interest to the rector. Degge's Pars. Coun. pt. i. c. 12. By the canon law the parson is bound to repair the church. By the common law the parishioners are bound to repair the nave, and sometimes the chancel, as in London, where, in many churches, it is the custom for the parishioners to repair the chancel.

A suit was brought against the Bishop of Ely, to compel him to repair the chancel of the church at Clare, in his diocese, his lordship being the impropiator of a portion of the great tithes. The bishop pleaded an immemorial custom for the parishioners to repair the chancel; and upon the issue the jury found for him, and the Court held that the custom controlled the general law. 2 Burn's Eccl. Law; tit. "Church," 353.

Where there is no such custom, the parson is to repair the chancel. *Ball v. Cross*, 1 Salk. 164. By the custom of England, *Peuse v. Prouse*, 1 Lord Raym. 59.; 1 Burn's Ecc. Law, 350., 9th ed. See Lindwood, 53.; Gibs. 199. See *Wise v. Metcalfe*, 10 B. & C. 299.

*Rectors and Vicars.*—By a constitution of Archbishop Winchelsea, the chancel shall be repaired by the rectors and vicars, or others to whom such repair belongeth. Lindwood, 253. Therefore, if there be both rector and vicar in the same church, they shall contribute in proportion to their benefice, if there be no certain direction, order, or custom as to which of them the obligation shall appertain. Id.

*Lay Impropriator.*—So lay impropriators are bound of common right to repair the chancels with the above limitations. 1 Burn's Ecc. Law, tit. "Church," 351. A question has, however, arisen as to the mode of compelling contribution on the part of a lay impropriator, whether by censures or by sequestration. See 3 Keb. 829.; but see *Walwyn v. Awberry*, 1 Mod. 258., 2 Ventr. 35., 2 Mod. 254.; also Gibson, 199.

*Repair of Chancel discharges Obligation to repair Church.*—The repairing the chancel is a discharge from contribution to the church, for the obligation of the one is a relief of the other; but the impropriator was held rateable for lands which did not belong to the parsonage, although

liable to repair the chancel.\* Davies' case, 2 Rol. R. 211., 2 Keb. 730. 742., Gibs., 199. Degge, 195.

*Parson may cut down Timber.*—The parson being obliged to repair the chancel, the statute 35 Ed. 3. s. 62. gives him the right to cut down timber in the church-yard for that purpose. It enacts that “Forasmuch as a church-yard, that is dedicated, is the soil of a church, and whatsoever is planted belongeth to the soil, it must needs follow that these trees, which be growing in the church-yard, are to be reckoned among the goods of the church, the which laymen have no authority to dispose, but, as the holy scripture doth testify, the charge of them is committed only to priests to be disposed of.”

Sect. 2. “And yet, seeing these trees be often planted to defend the force of the wind from hurting of the church; we do prohibit the parsons of the church that they do not presume to fell them down unadvisedly, but when the chancel of the church doth want necessary reparations; neither shall they be converted to any other use except the body of the church doth need like repair. In which case the parsons of their charity shall do well to relieve

\* And although churchwardens are not charged with the repairs of the chancel, yet they are charged with the supervisal thereof, to see that it is not permitted to dilapidate and fall into decay, and to make presentment thereof at the next presentation. 2 Burn's Ecc. Law, tit. “Church,” 359., 9th ed.



the parishioners, with bestowing upon them the same trees, which we will not command to be done; but we will commend it when it is done."

A vicar had cut down several great timber trees, and did not repair the church with them; and on a suggestion of this to the Court, and that he would cut more trees in like manner, a prohibition was granted *per Curiam* by the common law. *Knowle v. Harry*, Rol. 335.

*The Nave or Body of the Church.*—The church and church-yard must be repaired by the parishioners. 2 Inst. 489. The common law casting that obligation on them. *Bull v. Cross*, 1 Salk. 164.; see *Linwood*, 53. This obligation is in respect of the land which the party occupies in the parish, and it makes no difference where he resides. *Jeffrey's case*, 5 Rep. 66.; and see *Paget v. Crompton*, Cro. El. 659. The Governor of Greenwich Hospital is liable to repair the church, although it is a royal demesne, and has a chapel, chaplain, and burying-ground of its own. *Smith v. Keates*, 4 Hag. 275.

*Exemption.*—It has been shown, *antè*, p. 229., that a liability to repair the chancel exempts from the repairs of the church. The founder and his tenants may also be exempt. See *Degge*, 175.

The inhabitants of a chapelry may also be exempt. *Brown v. Palfry*, 2 Lev. 102.; *Wise v. Creeke*, 2 Id. 186.; and see *Ball v. Cross*, 1 Salk. 164.; *Godfrey v. Eversden*, 3 Mod. 264.; *Craven*

v. Sanderson, 4 Ad. & E. 666. ; see also Hob. 67. ; Noy. 41.

The occupiers of a church, chapel, or place exclusively appropriated to divine worship, are not liable to repair the church, nor are infant schools nor edifices for the charitable instruction of the poor liable to be rated. See 3 & 4 W. 4. c. 30.

*Union of Churches.*—Where churches are united, the obligation to repair is not altered at common law, but each parish must repair its own church, as before the union; and if one be taken down, the liability of the parishioners of that church ceases, and is not transferred to the other. Hob. 67.; but see 4 & 5 W. & M. c. 12.

*District Churches.*—As to the repairs of district churches, see 58 G. 3. c. 45.; 59 G. 3. c. 134. s. 27.

*Chapels of Ease.*—These chapels are to be repaired in the same manner as churches, by the inhabitants of the chapelry. 2 Inst. 489. See 1 & 2 W. 4. c. 38., as to repairs of private churches or chapels; they of course rest with the owners of them; and see 1 & 2 Vic. c. 106. s. 35.

*Chapels not District Churches.*—Repairs of chapels not made district churches are to be done by the parishes in and for which the chapel is built. 58 G. 3. c. 45. s. 70.

*Ornaments of the Church.*—For matters of ornament, as bells, seats, organs, utensils, &c., the charge is upon the personal estates of the pa-

rishioners, and for this reason persons must be charged for these where they live; but though, generally, lands ought not to be taxed for ornaments, yet by special custom both lands and houses may be liable to it. 2 Inst. 489., Cro. El. 843., Hetley, 131.; but see Degge, 173., 1 Bulstr. 20.

*Monuments.*—A gallery, monument, or tomb, cannot be erected without consent of the ordinary, nor can a seat be taken away without such consent. *Cart v. Marsh*, 2 Stra. 1080. The consent of the rector, it seems, is not requisite to obtain the bishop's faculty to erect a monument. *Bulwer v. Hare*, 2 East, 217.; see *Rich v. Burnall*, 4 Hag. 164. Churchwardens have not an unconditional power to erect monuments. *Beckwith v. Harding*, 1 B. & Al. 508.

*Defacement of.*—The defacement of monuments is punishable at common law. 3 Inst. 202.; *Spooner v. Brewster*, 3 Bing. 136. So of arms properly set up in a church. *Francis v. Ley*, Cro. El. 369.; see *Palmer v. Exeter (Bishop)*, 1 Stra. 576.

*Pews.*—The churchwardens cannot of themselves remove pews. 3 Phill. 170.; *Jones v. Ellis*, 5 Y. & J. 265.

## SECTION II.

*Of the Right to repair the Parsonage House and other Buildings, Fences, &c.—Timber.*

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*Parson bound to repair. — Prebends. — Curates. — Augmented Curacies. — Fraudulent Donee of Goods of Parsons liable for Repairs — restore and rebuild. — But only where necessary. — How far Liability extends. — Where Parsonage destroyed by Fire. — Are bound to do what outgoing Tenant would. — Liabilities increased. — Exchange of Livings. — Fences. — Hedges. — Exception. — Wood and Timber. — Underwood. — Grass. — Agriculture. — Digging Mines. — Earth. — Quarrying Stone. — Emblements.*

HAVING seen in the preceding section on whom the repairs of the church devolve, it will be requisite now to treat of the right to repair other ecclesiastical property.

*Parson bound to repair.*—The incumbent of every ecclesiastical benefice, whether he be archbishop, bishop, dean, prebendary, or parson, has but a limited estate for life, and each is bound for the benefit of his successor to keep the houses, buildings, trees, and glebe lands upon his benefice in good and sufficient repair, and to use all due diligence to prevent them from going to dilapidation or decay.

*Prebends.*—So a prebend is liable for dilapidations of a cathedral house assigned him by the bishop. Dr. Sand's case, Skin. 121. See 14 Ed. 3. c. 16.; 4 H. 4. c. 12.; Mallory, "Quare Imp." 6.; Davies' case, 2 Rol. R. 211.; 2 Keb. 730.; Vin. Abr., "Dilapidations;" and see *Run-corn v. Cooper*, 5 B. & C. 196.; but see Degge's Par. Coun., part i. c. 13.

*Curates.*—But a curate, in consequence of the uncertainty of his interest, holding merely at the will of him who appointed him, is not bound to do any repairs, not being an incumbent within 13 Eliz. c. 10.; the incumbent therefore must take care to see to the state of the buildings, for he must keep them in repair. *Orkington's* (curate) case, 3 Keb. 614., Gib. Cod. 792.; *Price v. Pratt*, Bunb. 273. But see the remedy given the rector, &c. where the whole profits of the curacy have been allotted to the curate. 57 G. 3. c. 99. s. 63.

*Augmented Curacies.*—Where curacies or chapels have been augmented by Queen Anne's bounty, they are considered as benefices, and the holders or their representatives liable for dilapidations. 1 G. 1. st. 2. c. 10. s. 4.; 29 Car. 2. s. 2.; Rog. Ecc. Law, "Dilapidations," 311.; see 59 G. 3. c. 134. s. 6.; 1 & 2 W. 4. c. 38. s. 12., which apply to those cases only where there are houses, or buildings, or lands attached. See 1 & 2 Vic. c. 106. s. 35.

*Fraudulent Donee of Goods of Parson liable for*

*Repairs.*—The statute 13 Eliz. c. 10. speaks of ecclesiastical persons suffering their palaces, houses, and other edifices and buildings belonging to their ecclesiastical benefices or livings, for want of due reparations, partly to run into ruin and decay, and in some part utterly to fall to the ground, which by law they are bound to keep and maintain in reparation, and makes the fraudulent donee of the goods of any archbishop, bishop, dean, &c., or any other having any dignity or office in any cathedral or collegiate church, or any parson, vicar, or other incumbent, &c., liable for any dilapidation as hath happened by his fact and default.

*Restore and rebuild.*—An incumbent of a living is bound to keep the parsonage house in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain any thing in the nature of ornament, such as painting (unless that be necessary to prevent exposed timber from decay), and whitewashing, and papering; and in an action for dilapidations against executors of a deceased rector by the successor, the damages are to be calculated upon this principle. *Wise v. Metcalfe*, 10 B. & C. 299. See injunction of *Ed. 6. v.*

*But only where necessary.*—In *Wise v. Metcalfe*, 10 B. & C. 313., Mr. Justice Bayly says, “From

this statement of the common law (which he had just given), two propositions may be deduced: 1st. That the incumbent is bound not only to repair the buildings belonging to his benefice, but also to restore and rebuild them if necessary. 2ndly. That he is bound only to repair, and sustain, and rebuild where necessary. Both these rules are very reasonable; the first, because, the revenues of the benefice are given as a provision, not for a clergyman only, but also for a suitable residence for that clergyman, and for the maintenance of the church; and if by natural decay, which, notwithstanding continual repair, must at last happen, the buildings perish, their revenues form the only fund out of which the means of replacing them can arise. The second rule is equally consistent with reason, in requiring that which is useful only, not that which is matter of ornament or luxury. See the constitution of Edmond, Archbishop of Canterbury, passed A.D. 1236, 21 H. 3.; Lyndwood, 250.; Ayliffe Parer, 217.

*How far the Liability extends.*—It has already been observed, that a parson is liable for permissive as well as voluntary waste; but this rule extends only to such buildings, &c. as are parcel of the benefice. See *Griffin v. Stanhope*, Cro. Jac. 456.; *Crimes v. Smith*, 12 Rep. 4.; *Wright v. Smithers*, 10 East, 409.; *Brown v. Ramsden*, 2 Moore, 612. Where, however, land had been

recently allotted under an Enclosure Act to the vicar, he was held liable to keep up the fences. *Bird v. Relph*, 2 Ad. and E. 773.

*Where Parsonage destroyed by Fire.* — Parsons are liable to repair damage done by fire. See *Sollers v. Lawrence*, 6 Willes, 413.; see the 22 Car. 2. c. 11., exempting parsons, vicars, and incumbents in London, from the necessity of renovating and rebuilding the churches which were destroyed in the great fire of London.

In the above case, *Willis C. J.* says, that if a suit in the Ecclesiastical Court be brought *ex officio* in the lifetime of the incumbent, we are informed the constant practice is to order a fifth part of the profits of the living to be set apart in order to rebuild the house. See *North v. Baker*, 3 Phil. 307.; but see the provisions of the 17 G. 3. c. 53., by which an incumbent is enabled to cast a portion of the expense of extensive repairs on his predecessor.

*Are bound to do what an outgoing Tenant would.* — Chief Justice *Best*, in *Perceval v. Cooke*, 2 Car. & P. 460., held at *Nisi Prius*, that the representatives of a late incumbent were not bound to do every thing which an incoming tenant would do. They are bound to do no more than ought to be performed by an outgoing tenant. They are, in fact, bound to do no more than restore what is actually in decay, and to make such repairs as are absolutely necessary for the preserva-



tion of the premises. The executors were not therefore bound to paint the rectory-house in oil, twice inside, and outside three times, nor to take off and renew the old tiling, lead the roof, nor to take out the old window-frames, which were in bad condition and old-fashioned, and replace them by new ones of modern style.

*Liabilities increased.*—But in the case of *Wise v. Metcalf*, 10 B. & C. 299., which is considered now a leading case on this subject, the liabilities of incumbents have been considerably increased. That was an action on the case by a rector in possession against the executor of the former rector, to recover the amount of dilapidations of the rectory house, barns, stables, and out-buildings thereto belonging, and the chancel of the church

It appeared the rectory house was built in 1624, of timber: the barns were not so old. The dilapidations were valued at 399*l.* odd, upon a principle invariably adopted by surveyors in such cases, viz. that the former incumbent ought to have left the rectory house, buildings, and chancel in good and substantial repair, the painting, papering, and whitewashing being in proper decent condition for the immediate occupation and use of his successor; that such repairs were to be ascertained with reference to the state and character of the buildings which were to be restored, where necessary, according to their original form, without addition or modern improvement.

If, however, the principle of valuation that ought

to have been adopted should be similar to that between landlord and outgoing tenant, then the painting, papering, and whitewashing ought not to be included, and the damages would be 310*l*.

But if the former rector ought to have left the rectory house, &c. wind and watertight only, or so as a tenant should, who was under no covenant to repair, then the damages would be 75*l*. odd.

And the question was, which of the above principles was the correct one; and after consideration, the judgment of the Court was delivered by Mr. Justice *Bayly*, in the following words:

“ This was an action for dilapidation by successor against the executor of the deceased rector; and the question was, by what rule the dilapidation as to the rectory house, buildings, and chancel were to be estimated. Three rules were proposed for our consideration: First, that the predecessor ought to have left the premises in good and substantial repair, the painting, papering, and whitewashing being in proper and decent condition for the immediate occupation and use of his successor, and that such repairs were to be ascertained with reference to the state and character of the buildings, which were to be restored where necessary, according to their original form, without addition or modern improvement, and the estimate according to this rule came to 399*l*. 18*s*. 6*d*. ”

The second rule proposed was, that they were to be left as an outgoing lay tenant ought to leave

his buildings where he is under covenant to leave them in good and sufficient repair, order, and condition; and the estimate by that rule was 310*l.*, papering, painting, and white-washing not being included.

The third rule was, that they were to be left wind and water tight only, or, as the case expresses it, in such condition as an outgoing lay tenant, not obliged by covenant to do any repairs, ought to leave them; and by that rule the estimate would be 75*l.* 10*s.*

We are not prepared to say that any of these rules are precisely correct, though the second approaches the most nearly to that which we considered as the proper rule.

The law and custom of England, or, in other words, the common law, as stated in some of the earliest precedents, (p. 12 and 13. Hen. 8. Rot. 126. C. B., and others which we have searched, and in 1 Lutw. 116.,) is as follows:—"Omnes et singuli prebendarii, rectores, vicarii, &c., pro tempore existentes, omnes et singulas domos, et edificia, prebendariarum, rectoriarum, vicariarum, &c., reparare et sustentare, ac ea successoribus suis, reparata et sustentata, dimittere et relinquere teneantur, et si hujusmodi prebendarii, rectores, vicarii, &c., hujusmodi domus et edificia, successoribus suis, ut premittatur, reparata et sustentata, non dimiserint et reliquerint, sed ea irreparata et dilapidata permiserint eidem prebendarii, &c., in vitis

suis, vel eorum executores, sive administratores, &c., post eorum mortem successoribus prebendariarum, &c., tantam pecuniæ summam, quantum pro reparatione, aut necessaria reedificatione hujusmodi domorum, et edificiorum expendi aut solvi sufficiet satisfacere, teneantur." An avertainment in terms nearly similar has been usually introduced into all declarations on this subject.

From this statement of the common law, two propositions may be deduced: first, that the incumbent is bound, not only to repair the buildings belonging to his benefice, but also to restore and rebuild them if necessary. Secondly, that he is bound only to repair, and to sustain, and rebuild when necessary. Both these rules are very reasonable; the first, because the revenues of the benefice are given as a provision, not for a clergyman only, but also for a suitable residence for that clergyman, and for the maintenance of the chancel; and if by natural decay, which, notwithstanding continual repair, must at last happen, the buildings perish, these revenues form the only fund out of which the means of re-placing them can arise. The second rule is equally consistent with reason, in requiring that which is useful only, not that which is matter of ornament or luxury.

It follows from the first of these propositions, that the third mode of computation proposed in the case cannot be the right one, because a tenant, not obliged by covenant to do repairs, is not bound to rebuild or replace. The landlord is the person

who, when the subject of occupation perishes, is to provide a new one if he think fit. And if the second proposition be right, a part of the charges contained in the first mode of computation must be disallowed: for papering, white-washing, and such part of the painting as is not required to preserve wood from decay, by exposure to the external air, are rather matters of ornament and luxury, than utility and necessity. The authorities which have been cited from the canon law are in unison with that which we consider to be the rule of the common law.

The earliest provision on this subject is the provincial constitution of Edmund, archbishop of Canterbury, passed A. D. 1236, 21 H. 3. It is in the following terms:—*Si rector alicujus ecclesiæ decedens domos ecclesiæ reliquerit dirutas vel ruinosas; de bonis ejus ecclesiasticis tanta portio deducatur, quæ sufficiat ad reparandum hæc et ad alios defectus ecclesiæ supplendos.* That constitution, therefore, directs the repairing "*domos ecclesiæ dirutas vel ruinosas.*" And Lindewood's commentary upon the words "*ad reparandum*" is "*Scilicet diruta vel ruinosæ. Et intellige hanc reparationem fieri debere secundum indigentiam et qualitatem rei reparandæ ut scilicet, impense sint necessariæ non voluptuosæ.*" The next authority cited from the canon law was the following legatine constitution of Othobon, promulgated A. D. 1268, 52 H. 3.:—

"*Improbam quorundam avaritiam prosequentes*

qui cum de suis ecclesiis et ecclesiasticis beneficiis multa bona suscipiant domos ipsarum, et cætera ædificia negligunt, ita ut integra ea non conservent, et diruta non restaurent;" that is the imputation against the clergy. The constitution then goes on: — "Statuimus et præcipimus ut universi clerici suorum beneficiorum domos, et cætera ædificia prout indiguerint, reficere studeant condecenter, ad quod per episcopos suos vel archidiaconos solícite moneantur. Cancellos etiam ecclesiæ per eos qui ad hoc tenentur refici faciant, ut superius est expressum, archiepiscopos vero et episcopos, et alios inferiores prælatos, domos et ædificia sua sarta tecta, et in statu suo conservare et tenere sub divini iudicii attestazione præcipimus, ut ipsi ea refici faciant quæ refectione noverint indigere."

The statute 13 Eliz. c. 10. speaks of ecclesiastical persons suffering their buildings, for want of due reparation, partly to run to ruin and decay, and in some part utterly to fall to the ground, which by law they are bound to keep and maintain in repair; and makes the fraudulent donee of the goods of an incumbent liable for such dilapidation as hath happened by his fact and default. If the incumbent was bound by law to keep and maintain the dwelling-house in repair, any breach of his duty in that respect would be a default. The 57 G. 3. c. 99. s. 14. enacts that a non-resident spiritual person shall keep the house or residence in good and sufficient repair; and directs that

if it be out of repair, and remain so, the parson is to be liable to the penalties of non-residence, until it is put into good and sufficient repair to the satisfaction of the bishop. There is nothing either in the authorities cited from the common law, or in these acts of parliament, to shew that the obligation of an incumbent to repair is other than that which I have already stated the common law threw upon him, viz. to sustain, repair, and rebuild when necessary. Upon the whole, we are of opinion the incumbent was bound to maintain the parsonage, which we must assume upon this case to have been suitable in point of size, and in other respects, to the benefice, and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain any thing in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and white-washing and papering belong; and the damages in this case should be estimated upon that footing. It will be found that this rule will correspond nearly with the second mode of computation, and probably will be the same if the terms, order, and condition, are meant, as they most likely are, not to include matters of ornament or luxury.

It was afterwards referred to the master to calculate the damages upon this principle, and to

report for what the judgment should be entered up; and he directed it to be for 369*l.* 18*s.* 6*d.*, and for that sum there was judgment for the plaintiff.

*Exchange of Livings.*—Two clergymen being possessed of livings, agreed to exchange them with consent of their respective patrons, and the livings were accordingly resigned into the hands of the bishop, and each party respectively was inducted into the other: there was no specific agreement entered into upon the subject of dilapidations, but it was found that neither party at the time contemplated any claim for dilapidations. Held, in an action by one of the incumbents against the other as his successor, for dilapidations, that the plaintiff was entitled to recover. *Dounes and Craig*, 9 M. & W. 166.

*Fences.*—There is no doubt, said the court, that as to the fences of the ancient glebe, the executors of a vicar are liable to the successor for dilapidations; that appears from *Lindwood*. *Bird v. Relph*, 2 Ad. & E. 773.; see *Lindwood*, 244.; *Gib. Co.* 32. c. 3. p. 789.

Under an inclosure act lands are fenced in, and allotted to the vicar and his successor in lieu of tithes. The vicar dies, leaving the fences out of repair. Held, that his executors were liable to be sued by the succeeding vicar for dilapidations. *Bird v. Relph*, 4 N. & M. 878., 2 Ad. & E. 773.

*Hedges.*—It is said that, although in the stat. 13 Eliz. ch. 10., nothing is referred to as dilapida-



tions but decayed and ruinous buildings, yet it is certain that, under that name, are comprehended fences, and hedges in the like condition. Rogers, Ecc. Law, "Dilapidations," 309.

*Exception.*—But the court said it does not however necessarily follow, that if a vicarage be endowed with new land, or, as in this case, with an allotment of common, that the vicar should be bound to repair the fences to it, because, if it came to the vicar without any fences, the vicar in most cases at least would not, unless he put up fences, himself be bound to fence it, so as to subject his executors to an action for dilapidations. *Bird v. Relph*, 2 Ad. & E. 773.

*Wood and Timber.*—And it hath been particularly adjudged concerning wood and timber, that the felling them by any incumbent, otherwise than for repairs, or for fuel, is dilapidation. Rogers, Ecc. Law, *suprà*; Gibs. Codex, 791.; Knowle v. Harry, 3 Bulst. 158.; 1 Rol. R. 335.; see R. v. Zakar, 3 Bulst. 91.; Reform. Leg. Eccl. fol. 39.; Herring v. St. Paul's (Dean and Chapter of), 3 Swanst. 492. A bishop has no power to make a lease without impeachment of waste; and therefore, under such a lease, the lessee cannot take timber. Winchester (Bishop of) v. Walgur, 3 Swanst. 493.; see Jefferson v. Durham (Bishop of), 1 B. & P. 128. per C. J. Eyre. The woods are called the dower of the church. Anon. 2 Bulst. 279.; see Liford's case, 11 Rep. 49.

A dean and chapter are not bound to use the

timber felled in the repairs; they may sell it, and buy other. *Withers v. Winchester* (Dean and Chapter), 3 Mer. 421.

An incumbent may fell timber for the repairs of the parsonage house, chancel, barns, and other buildings, or for pews, parcel of the benefice. *Strachy v. Francis*, 2 Atk. 217. It should seem, therefore, he would be entitled to use timber for the repairs of the glebe fences.

*Underwood*.—If it is the custom of the country, he may cut down underwood for any purpose, but if he grub it up it is waste. *Id.* Bad wood may also be cut down. *Id.*

As to timber in church-yards, see *antè*, p. 235., and 35 Ed. 1. st. 2. The parson may take the lopping of the trees in the church-yard. *Line v. Harris*, 1 Lee's Judgments, 146.

*Grass*.—So he may mow the grass in the church-yard. *Id.*

*Agriculture*.—Miscultivation of glebe lands does not fall within the meaning of dilapidations, and an action on the case will not lie in respect of it. *Bird v. Relph*. 1 N. & M. 415.; 4 B. & Ad. 826.

*Digging Mines*.—The digging a coal mine in a glebe is not waste. Countess of Rutland's case, 1 Lev. 107.; 1 Siderf. 152.; *Knight v. Mosely*, 1 Amb. 176.; where Lord *Hardwick* said, a parson cannot open new mines, but may work those already opened.

*Earth.*—As to the right to carry away earth; see London (Bishop of) *v.* Webb, 1 P. Wms. 527.; nor can he remove the soil of the church-yard, Bennet *v.* Ranaken, 2 Hag. 25.

*Quarrying Stone.*—Nor can an incumbent quarry stone except for repairs. Id.

*Emblements.*—As to the right of an incumbent to emblements, see that title, *antè*, p. 177.

## CHAPTER III.

*Of the Remedies for Ecclesiastical Dilapidations.*


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SECT. I. — *By Visitation.*

SECT. II. — *By Prohibition.*

SECT. III. — *Injunction.*

SECT. IV. — *Action at Law.*

SECT. V. — *Ecclesiastical Suit.*

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## SECTION I.

*By Visitation.*


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*Several Means of Preventing Dilapidations.*—*During Vacancy.*—*Bishop bound to view Churches, &c.*—*Assisted by Archdeacon, &c.*—*A Preventive Measure.*

*Several Means of Preventing Dilapidations.*—

THE anxiety of the law has been always so great to preserve the temporalities of the church from dilapidation and decay, that there has been several means adopted for the prevention thereof, as well by the courts of equity and common law, as also by the ecclesiastical courts.

*During Vacancy.*—The statute 9 H. 3. c. 5., re-enacted by 3 Ed. 1. c. 21., provides that the king shall keep the lands, houses, &c., of all archbishop-

rics, bishoprics, abbeys, priories, churches, and dignities, during the time the sees are vacant.

And bishops are enjoined to keep their temporalities in repair *sub attestazione divini judicii*. Othob. Const. tit. 17.

*Bishop bound to view Churches, &c.* — It is the duty of the bishop in his visitations to view the state of the churches, mansions, &c., and, when requisite, admonish the incumbent to repair out of the revenues of the church.

*Assisted by Archdeacon, &c.* — In this office the bishop is assisted by the archdeacon. Degg. Par. Coun. 2 C. 15.; see Othob. Leg. Const. 17. 86 Can. So rural deans have a right to visit every church and mansion-house within their deaneries. Gib. Co. 972.

*A Preventive Measure.* — This proceeding is a preventive measure, by which the progress of decay is stayed, and the tenements are preserved from that dilapidation which would be the result of the incumbent's neglect.

## SECTION II.

*By Prohibition.*

*Remedial.*—*What Court may issue.*—*Obsolete.*—*Lies when Party proceeds in Ecclesiastical Court having already recovered Damages for the same Dilapidations.*

*Remedial.*—THIS remedy is more applicable when there is voluntary waste. By this writ, the incumbent is restrained from doing any act to the injury of the tenements.

*What Court may Issue.*—The court of Queen's Bench have jurisdiction to issue this writ. See Lifford's case, 11 Co. R. 49. *g h.*; Durham's (Bishop of) case, nom. Stockman v. Wither, 1 Roll. R. 86.; Knowle v. Harry, 3 Bulst. 128.; 1 Roll. R. 335.; R. v. Zakar, Id. 91.; and see Eyre C. J. in Jefferson v. Durham (Bishop), 1 B. & P. 120. But the court of Common Pleas have not, at least at the instance of a stranger. Id. The writ, however, would issue out of Chancery; and if, after that, the party committed waste, he was attached. Winchester (Bishop) v. Wolgar, 3 Swanst. 493.; Acland v. Attwell, Id. 499.

*Obsolete.*—This remedy has now become obsolete, and has given way to a more efficient and convenient remedy, viz. an injunction.

*Lies when Party proceeds in Ecclesiastical Court, having already obtained Damages.* — A prohibition was moved for to the Ecclesiastical Court upon suggestion that the plaintiff in that Court had brought a suit at common law for the same dilapidations, in which action the defendant pleaded tender of 10*l.* which was sufficient to repair the said dilapidations, and the plaintiff took issue that the 10*l.* was not sufficient, and the verdict found sufficient, upon which judgment was given for the defendant, and he pleaded this judgment in bar to the suit in the Ecclesiastical Court, which they refused to receive, and the court granted a prohibition. *Okes v. Ange*, 3 Lev. 413.

## SECTION III.

*Injunction.*

THE court of Chancery will restrain a bishop or dean and chapter, at the suit of the sovereign, from committing waste, or a parson at the suit of his patron. So an injunction will be granted at the suit of the patroness, during the vacancy, against the widow. 3 Br. C. C. 552. But the lessee of a bishop, or one having no interest in the freehold of the benefice, is not entitled to an injunction. *Strachy v. Francis*, 2 Atk. 217.; *Hoskins v. Featherstone*, 2 Brow. 552.; *Knight v. Mosely*, Amb. 176.; *Withers v. Winchester* (Dean and Chapter), 3 Mer. 421.



## SECTION IV.

*Action at Law.*

*Against whom. — The most Effectual Remedy. — First Proposed. — No Distinction between Prebendary and other Ecclesiastical Person. — Separate Actions — but not second Action for the same Dilapidations. — Incumbent must be seised. — The Incumbent must be seised of the Tenements dilapidated in right of his Benefice. — How Dilapidation to be ascertained. — How Damages estimated. — In what order Damages payable. — Sums recovered to be expended on Repairs.*

*Against whom.* — WHERE the benefice has been avoided by the resignation or promotion of the incumbent, an action on the case at common law may be brought against him. But where the benefice has become vacant by the death of the incumbent, the successor may bring his action against the representative of the deceased prebendary, rector, vicar, &c. *Jones v. Hill*, 3 Lev. 268., Carth. 224.; *Radcliff v. D'Oyly*, 2 T. R. 630.

*The most effectual Remedy.* — As is said by Mr. Justice *Buller*, in *Radcliffe v. D'Oyly*, 2 T. R. 634., the most effectual remedy is by action on the case, which action is upon the custom of the realm. *Jones v. Hill*, 3 Lev. 268.; *Id.* 413.; *Young v. Manby*, 4 M. & C. 183., 2 Ad. & E. 772.

*First proposed.* — It is said by *Gibson* (Codex,

791.), that Sir Simon Degge was the first writer who proposed the doctrine of an action on the case in the temporal courts, and he states that there are multitudes of cases even in the time of popery. Degg. 77.

“By the custom of England, which is the common law, actions on the case have been frequently brought, both anciently and of later times, and damages recorded; but it was for some time doubted whether there was any remedy for dilapidations at common law.” Vin. Abr. “Dilapidations”(A). But the action is now in common use; see *suprà*.

*No Distinction between Prebendary and other Ecclesiastical Person.*—A distinction was attempted to be raised between a prebendary and other ecclesiastical person, it being contended that he was not liable in this form of action, but could be sued only in the Ecclesiastical Court; but this distinction was overruled, *Buller J.* observing, “There is no distinction whether the proceedings for dilapidations be in the common law or spiritual courts, though the remedy in the former is more effectual. It is certainly true that in times past there was considerable doubt entertained, whether this sort of action could be maintained at all against ecclesiastical persons.” *Radcliffe v. D'Oyly*, 2 T. R. 630.

*Separate Actions for different Dilapidations.*—The successor may have separate actions against the executor of the late rector for dilapidations in

different parts of the rectory; therefore an action brought for dilapidations in the chancel and the pew there, a plea of a former action brought for want of reparation to the rectory-house, out-houses, and cottages belonging to the rectory, and of the gates and hedges upon the glebe lands, was held to be no answer to the second action, Lord *Ellenborough* saying, "If the defendant could make out that an injury caused by dilapidations was one identical injury forming precisely the same cause of action for every part of it, then there could be but one action. But I have heard no authority to that effect; nor does it appear to me that there is any reason why this should be considered as one cause of action compounded of the several injuries sustained in the several parts. They are different and independent injuries in respect of the different parts. The injury from the dilapidations of the house is one thing, that from the dilapidations of the chancel is another, and the causes are distinct. The one might not be consummate when the other was. It seems to me, therefore, that the plaintiff may maintain this action as convenience or subsequent discoveries enable him. *Young v. Manby*, 4 M. & S. 187.

*Incumbent must be seised of the Tenements dilapidated in right of his Benefice.* — To entitle an incumbent to sue for dilapidations at common law, he must shew that he is seised of the tenements in respect of which dilapidations are claimed in

right of his benefice. Therefore, although successive rectors had been in possession of certain tenements during a period of fifty years, yet if it be shewn by the original grant that the fee of such tenements is in other persons, the rector cannot recover. Thus, where successive rectors had been in possession of land for above fifty years past, but in an action for dilapidations brought by the present against the late rector, it appeared that the absolute seisin in fee of the same land was in certain devisees since the statute 9 G. 2. c. 36., and that no conveyance was enrolled according to the first section of that act, nor any disposition of it made to any college, &c. according to the fourth section; held, that no presumption could be made of any such conveyance enrolled (which, if it existed, the party might shewn), and consequently, that the rector

had no title to the land, as the statute avoids all other grants, &c., in trust for any charitable use, made otherwise than is thereby directed, although in fact it appeared that one of these devisees was the then rector, and that the title to the rectory was in Baliol College, Oxford. *Wright v. Smithies*, 10 East, 209.

In a declaration by a vicar against his predecessor for dilapidations, he averred that he was seised in right of his vicarage: it appeared that part of the premises were copyhold, and devised to the master and senior fellows of a college in

trust, to permit the vicar to receive the profits arising therefrom after deducting certain charges, which might accrue to the lord of the manor, or the expenses attending the repairs of the premises: held, that the legal estate was vested in the trustees, the use was not executed within the statute 9 G. 2. c. 36., and consequently the plaintiff was not entitled to recover. *Browne v. Ramsden*, 2 Moore, 612.

*How Dilapidation to be ascertained.* — A bishop, as soon as he is installed, and a rector or vicar, as soon as he is inducted, ought to procure workmen, as carpenters, masons, tilers, and others skilled in building, to view the dilapidations, or whatever shall want repairing, and write down for what sum a workman will or may rebuild or repair the same, and set their hands to the same for a memorial thereof, when they shall be called to be witnesses thereunto. For after this inspection shall be made, such bishop, rector, or vicar may commence his suit when he pleaseth; and such workmen, in support of such action, ought to prove that such decay can be sufficiently repaired or amended for such sum, and that they themselves would not do it for less; and that such proof may be sufficient, it is requisite that there be two witnesses in every particular, and not one witness to one kind of work only, and another to another. 1 Burn's Ecc. Law, "Dilapidations," 147.

*How Damages estimated.*—If the benefice hath

been vacant for some time, as for three or four years, or if the incumbent hath not sued for some time after his induction or installation, nor caused the dilapidations to be viewed and estimated, he shall not be entitled to recover the whole sum estimated for dilapidation; but consideration shall be had of the time elapsed from the cessation of the last incumbency, and a proportionable deduction made for the decays which may reasonably be supposed to have happened during such intermediate time. Clark, tit. 126.; 1 Ough. 255.

On this subject see the case of *Wise v. Metcalf*, *antè*, p. 139.

If the present incumbent have repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber in the estimate of dilapidations due for them. *Percival v. Cooke*, 2 Car. & P. 460. per *Best C. J.*

The statutes of the church of Ely provide that the receiver shall require the prebendaries to repair their houses when necessary, and upon their default repair them at their costs; but the materials are to be supplied out of the funds belonging to the church, and the charges of the workmanship only are to be borne by the prebendaries. On a question whether a succeeding prebendary should recover against his predecessor the full estimate of the repairs wanting, or the amount of the workmanship only, the

court thought it reasonable that he should recover the amount of the workmanship only, and held that the church was still bound to supply the materials. *Radcliffe v. D'Oyly*, 2 T. R. 639.

*In what order Damages are payable.* — It seems that damages for dilapidations payable by the executors or administrators of the late incumbent of a benefice to his successors are to be postponed, in order of payment, to the debts of the deceased of every description. *Degge's Par. Coun.* 91.; 2 Wms. Exrs. 823.

*Sums recovered to be expended on Repairs.* — The 14 Eliz. c. 11. s. 18. enacts, "That all sums of money hereafter to be recovered for, or in the name of, dilapidations, by sentence, composition, or otherwise, shall within two years after such receipt be truly employed upon the buildings and reparations in respect whereof such money for dilapidations shall be paid, on pain that every person so receiving, and not employing as aforesaid, shall forfeit double as much as shall be by him received and not employed, the which forfeiture shall be to the use of the Queen's Majesty, her heirs and successors.

SECTION V.

*Ecclesiastical Suit.*

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*Where brought.—Fraudulent Grant.—Against Sequestrator.  
— Lay Improprators.—Deprivation.—Sequestration.—  
What Portion sequestered.—In Cases of Non-residence.*

THE party has also a remedy by suit in the Ecclesiastical Court, by which he will be restrained to repair by censures, by sequestration, or he will be punished by deprivation.

*Where brought.*—Suits for dilapidations are still brought in the Bishop's or Consistory Court.\* Degge says (p. 77.), "Suits for dilapidations are most properly and naturally to be sued for in the spiritual courts; and if any prohibition be granted, the same ought to be superseded by a consultation; but this is intended when the suit is grounded on the canon law." F. N. B. 51 f.; Carter, 224.; Dr. Sand's case, Skin. 121.

\* See the Rep. of Eccles. Comm. 51. as to the retention of spiritual suits in cases where the parsonage-house, stables, barns, or any other of the buildings or the fences on the property of the church are allowed to fall into decay, or when fire occurs. The commissioners recommend the continuance of these suits, but in the nature of a civil suit rather than, as heretofore, in a criminal form.



*Fraudulent Grant.* — The 13 Eliz. c. 5. makes void any fraudulent grant by an incumbent of his property with a view of defrauding his successor of his remedy for dilapidations, and the 13 Eliz. c. 10. gives a remedy in the Ecclesiastical Court against the alienee of personalty, and puts him in the same condition as if he were the executor or administrator of the dilapidator.

*Against Sequestrator.* — In *Whinfield v. Watkins* (2 Phil. 3.), Lord *Stowell* admitted a libel against the sequestrator of a living, as being liable for dilapidations. See *Hubbard v. Beckford*, Id. in notis; *North v. Baker*, 3 Id. 307.

*Lay Impropropriators.* — In cases of lay impropriators, however, all the Ecclesiastical Court can do is, to order the repairs to be done, or compensation made, and in default, the party may be imprisoned for his contumacy. They cannot sequester his goods even for dilapidations of the chancel. *Walwyn v. Awberry*, 1 Mod. 258. Nor can the goods of parties be sequestered, who are bound by custom to repair the fences of the churchyard. *Glaydon v. Duncomb*, 2 Rol. Abr. 287.; see *Linwood*, 89. and 13 Eliz. c. 10. s. 2.; and 13 Eliz. c. 5.; *Degge*, 1. c. 8. For further information on this subject, the following may be consulted: — *Gib. Co.* 32. c. 3; *Injunction*, Ed. 6. and *Eliz.*

*Deprivation.* — It seems also that, by the canons of the Church, a spiritual person may be deposed

or deprived by his superior for dilapidations. 3 Inst. 204.; Degge, 77.; Ayliffe Parer, 218.

It is said to be a good cause of deprivation if a bishop, parson, vicar, or other ecclesiastical person, dilapidate the buildings, or cut down timber growing on the patrimony of the church, unless for necessary repairs. *Stockman v. Witham*, 1 Rol. R. 86.; *Durham's* (Bishop of) case, 11 Co. R. 49.; see *Bagg's* case, 11 Rep. 98.; *Godb.* 259. 279.; *Viner's* Abr. tit. "Dilapidations" (a).

*Sequestration.* — If, after admonition, the person neglect to do the necessary repairs, the bishop may, by ecclesiastical censures, and other lawful remedy, and also by sequestration of the profits, compel the repairs to be done. *Ayliffe Parer*, 218.

*What Portion sequestered.* — In case of dilapidations, the whole ought not to be sequestered, but to leave a portion to the parson for his livelihood. *Walwyn v. Awberry*, 2 Ventr. 35.

*Dr. Wood*, bishop of Lichfield and Coventry, was suspended by Archbishop Sancroft for dilapidations, and the profits of the bishopric were sequestered, and the episcopal palace built out of them. *Dr. Wood's* case, 12 Mod. 237.

By the sequestrations of Ed. 6. 1547, the proprietors, parsons, vicars, and clerks having churches, chapels, or mansions, shall yearly bestow upon the same mansions or chancels of their churches being in decay the fifth part of their benefices,

till they be fully repaired, and the same so repaired shall always keep and maintain in good estate. Godol. Abr. 176.; see Eliz. Injunctions, 1576, art. 13. id.

The 1 & 2 Vic. c. 106. s. 54. makes in cases of sequestration, an express reservation and provision for the repair and sustentation of the chancel, house of residence, glebe, and demesne lands.

The general course is to sequester one fifth, and if the party be dissatisfied he may appeal. See 3 Phil. 309. per Sir J. Nicholl.

A sequestrator is bound to repair the edifices belonging to the benefice, and may be compelled to do so by process from the bishop's court. The repair of the church is as necessary a charge as the supply of the church itself. But if the sequestration have been finished and determined, and the accounts made up, the Ecclesiastical Court, it seems, cannot interfere. *Whinfield v. Watkins*, 2 Phil. 1.; Rogers, Eccl. Law, tit. "Dilapidations," 317.

If after the dilapidations are repaired, the sequestrators refuse to deliver up their charge, they may be compelled to do so by the ecclesiastical judge; and if they delay giving an account, the bond and warrant of attorney, which it is usual for the sequestrators to give as security, are generally given up to enable the party aggrieved to sue on them at common law. Id.; *Watson's C. L.* 30.

*In Cases of Residence.*—The 57 G. 3. c. 99.

s. 14. provides for the non-repair of the house of residence when the parson is exempt from residence.

The statute 1 & 2 Vic. c. 106. provides for dilapidations occurring during the non-residence of the incumbent.

The 41st sect. enacts that every spiritual person having any house of residence upon his benefice, who shall not reside therein, shall, during such period or periods of non-residence, whether the same shall be for the whole or part of any year, keep such house of residence in good and sufficient repair; and in every such case it shall be lawful for the bishop to cause a survey of such house of residence to be made by some competent person, the costs of which, in case the house shall be found to be out of repair, shall be borne by such spiritual person; and if the surveyor shall report that such house of residence is out of repair, it shall be lawful for the bishop to issue his monition to the incumbent to put the same in repair, according to such survey and report, a copy of which shall be annexed to the monition; and every such non-resident spiritual person who shall not keep such house of residence in repair, and who shall not, upon such monition, and within one month after service of such monition, show cause to the contrary, to the satisfaction of the bishop, or put such house in repair within the space of ten months, to the satisfaction of such bishop, shall be liable to all the penalties for non-residence imposed by

this act during the period of such house of residence remaining out of repair, and until the same shall have been put in repair.

By sect. 43. it is made a condition to obtaining a licence to live in a house, not being a house of residence, that the latter shall be kept in good and sufficient repair, and condition to the satisfaction of the bishop.

## CHAPTER IV.

### *Lay Dilapidations.*

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*Between Parties standing in the relative positions of Landlord and Tenant, where there is no Contract nor Obligation but what the Law implies; and herein of the Liability when Dilapidations accrue whilst treating for the Purchase.*

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SECT. I. *Between Landlord and Tenant from Year to Year.*

SECT. II. *Tenants at Will.*

SECT. III. *Tenants by Elegit, Statute Merchant or Staple.*

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### SECTION I.

*Between Landlord and Tenant from Year to Year.*

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*Landlord not compellable by Action to repair.—Tenant must keep House in Tenant-like manner.—Not bound to substantial Repairs.—Wind and Water-tight, bound, though Lease void.—When Injury caused by the Elements.—Fire.—Tenant overholding, &c.—Tempest.—Flood.—Agricultural Dilapidations.—Farming Premises must be kept in Tenant-like Repair.—Not liable for Permissive Waste of.—Who liable for.—When Dilapidations accrue whilst treating for the Purchase.*

*Landlord not compellable by action to repair.—*  
**WHEN** no agreement or stipulation respecting

the repairs has been entered into, the tenant or lessee is always liable for them. The landlord is never obliged to repair except when he has bound himself by contract so to do, *Pindar v. Ainsley and Rutter*, cited 1 T. R. 312.; even where the landlord insured the premises against fire and on their being burned down, received the amount from the office. *Balfour v. Warton*, Id. 312.; *Leeds v. Chatham*, 1 Sim. 151.; *Bayne v. Walker*, 3 Dow. 223.; see *Brown v. Quilter*, Ambl. 619. When it is stated, however, that the landlord is never liable to repairs, it must be understood only that an action cannot be maintained against him for not repairing, for the tenant is bound only to ordinary repairs; and therefore, if the landlord do not choose to do the substantial repairs, the tenant may leave the premises, as there can be no beneficial occupation in such a case. *Edwards v. Hetherington*, 7 D. & R. 117; *S. C. Ry. and Moo.* 268.; *Salisbury v. Marshall*, 4 C. & P. 65.

Of course this implied obligation can only arise where there exists no lease; for, where there is a lease, the liabilities of both parties are particularly prescribed.

*Tenant must keep House in a tenant-like manner.*

Where there is an express written agreement for the hire of a house, and for keeping it in repair, the implied obligation to use it in a tenant-like manner is part of the contract. *Holford v. Bessett*, 7 M. & W. 348.; 1 H. & W. 67.

Tenants from year to year are bound to commit no waste; because the law implies a contract on their part to use the premises in a tenant-like manner. 16 Sand. 323. b/n. 7; Co. Lit. 87 a.; 11 Moore, 100. In *Salop (Countess) v. Crompton* (Cro. Eliz. 777, 784), the principle with regard to the liability of a yearly tenant to repairs seems to be established, that he was only answerable when the injury happened to the demised premises through voluntary negligence; they are not, however, liable for dilapidations, which are the consequences of their occupation, or the result of inevitable accident; but merely for such as may be considered fair and reasonable repairs. See *post*.  
*Not bound to substantial Repairs.* — And accordingly Lord Kenyon held at Nisi Prius that a tenant from year to year is only bound to fair and tenantable repairs, so far as to prevent waste or decay of the premises, not to substantial and lasting repairs, such as new roofing, &c. His Lordship observed that a tenant from year to year is bound to commit no waste, and to make fair and reasonable repairs, such as putting in windows and doors that have been broken by him, so as to prevent waste and decay of the premises; but, in the present case, the plaintiff has claimed a sum for putting on a new roof on an old worn out house; this I think the tenant is not bound to do. *Ferguson v. Hall*, 2 Esp. 590.

*Only bound to keep the House wind and water-*



*tight.* — In *Auworth v. Johnson* and others it was held, that a tenant from year to year of a house is only bound to keep it wind and water-tight. 5 Car. & P. 239. It appeared that the stairs of the house were worn out, new sashes were wanted, the doors were rotten and falling to pieces from decay, the sash lines, latches, catches, keys, and locks were broken and damaged, and a panel of one of the doors was broken. It was admitted that the defendants were not liable for substantial repairs; but it was contended that they had not done that which a tenant from year to year ought to do; that they ought to make good the sash lines, broken panel, and the latches, &c.; and Lord *Tenterden* C. J. in summing up, said, "It appears that this was a very dilapidated house when the defendants took it, and that they have had a very considerable quantity of work done upon it. However, the first question is, What are the things which the occupier of a house from year to year is bound to do? I am of opinion that he is only bound to keep the house wind and water-tight, and that, that is all he is bound to do. A tenant who covenants to repair is to sustain and uphold the premises; but that is not the case with a tenant from year to year. A great part of what was claimed by the plaintiff consists of new materials where the old ones were actually worn out; for that, the defendants are clearly not liable; and if you think that the defendants have done all that tenants from

year to year ought to do, considering the state of the premises when they took them, the defendants are entitled to your verdict;" and in accordance with this case is *Leach v. Thomas*, 7 C. & Pa. 328., where Mr. Justice *Patteson* said, as the defendant was tenant from year to year, he was not bound to do substantial repairs; he was only bound to keep the premises wind and water-tight.

*Tenant bound by Covenant through Lease void.*—

Where a tenant took premises by written agreement, which was neither stamped nor signed by both parties for three years and a quarter, and engaged to keep them in good repair during his occupation, it was held that he was bound by the covenant to repair, though the agreement was void, as to the duration of the time, by the Statute of Frauds. *Richardson v. Gifford*, 1 Ad. & E. 52.; 3 Nev. & M. 325.

A. devised certain estates to B. for life, with a leasing power; the devisee made a lease (excluding the power) which contained the usual covenants to repair, the lease was afterwards assigned to the defendants who took possession; and it was held, that although the lease was void, the defendants held as tenants from year to year under the covenants of the lease, and were liable to repair up to the end of the term. *Beal v. Sanders*, 3 Bing. 859.; 1 Jur. 1083.

*Wear and Tear.*—A yearly tenant is not liable for injuries arising from accidental fire, wear and

tear, and the like, *Torriano v. Young*, 6 George R. 84; see *Martin v. Gillham*, 2 New & P. 568. *When Injury caused by the Elements.*—*Fire.*—When there is no express stipulation to that effect, the tenant is not bound to repair in case of fire, as the statute 6 Ann. c. 31, s. 67. (made perpetual by 10 Ann. c. 14.) provides that no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, although both in this statute and the building act (14 Geo. 3. c. 78.)\* agreements between the landlord and tenant respecting repairs are expressly excepted. 2 Har. & Ed. N. P. 1031.

*Tenant overholding.*—If a tenant hold over after the termination of his lease, he is presumed to hold under all the old covenants of the lease, and will be liable under a covenant in the expired lease to keep the premises in repair; and if they are afterwards burned down, he must rebuild them. *Digby v. Atkinson*, 4 Camp. 275.

*Tempest.*—*Flood.*—If a house be blown down by tempest, or destroyed by a flood, the tenant is not liable to rebuild it. If, however, the roof be stripped by the wind, the tenant must repair it at convenient time. Co. Lit. 53. a.; Bro. Abr. tit. "Conditions," pl. 40.; 2 Rol. Abr. 818.

*Agricultural Dilapidations.*—Where a tenant

\* See Metropolitan Building Act, 7 & 8 Vic. c. 54, Schedule A.

agreed to leave a farm as he found it, it has been held to be an agreement to leave it in tenantable repair if he so found it, and will maintain a declaration so laid. *Winn v. White*, 2 Black. Rep. 840.

*Farming Premises must be kept in tenantable repair.*—A tenant from year to year of farming premises is bound, as has been observed with respect to yearly tenants of houses, only to fair and tenantable repairs, so as to prevent waste or decay of the premises, and not to substantial or lasting repairs. *Ferguson v. —*, 2 Esp. 590.

For the law will not imply a contract on the part of such a tenant to repair generally, or to do any particular acts, but merely to use the farm in a husband-like and tenant like manner, according to the custom of the county in which the farm is situated. *Horsefall v. Matthew*, Holt, 7; *Gibson v. Wells*, 1 N. R. 291.

*Not liable for Permissive Waste.*—But he is not liable for want of repairs arising from mere neglect, because this is mere permissive waste, for which he is not liable. *Herne v. Benbow*, 4 Tannt. 764.

*Who liable for.*—A tenant who had been let into possession under an instrument which did not amount to a present lease, and had paid rent under the agreement, was held liable, in an action for the mismanagement of the farm, under a count stating

the premises to have been demised to him. *Tempest v. Rawling*, 13 East, 18.

*Where Dilapidations accrue whilst treating for the Purchase.* — The completion of a contract having been delayed for thirteen years, the property became deteriorated by dilapidation:—Held, under the circumstances, that the loss must fall on the purchaser, as the state of the title was such that he ought to have completed the purchase and taken possession. *Minchin v. Nance*, 4 Beav. 332.

In August, 1828, the plaintiff agreed to sell a property to the defendant, the contract was to be completed on the 9th of October following, and the purchaser was to be entitled to possession; and if the purchase should not then be completed, the purchaser was to pay interest at 3*l.* per cent. from that day until full payment. The abstract having been delivered, all parties seemed to agree that a good title was not shown, and in November, 1828, the time for completion, was enlarged to the 21st of February, 1829, when the purchase-money was to be paid without interest, and the defendant let into possession; and if the plaintiff should fail to make a good title, the deposit was to be returned with interest at 4*l.* per cent. from the 9th of October. The defendant refused to complete, and in 1829 brought an action for his deposit, and the plaintiff filed his bill for specific performance. The defendant had not

taken possession, and great dilapidation had occurred. It was decided that a good title had been shown in August, 1828. A decree was made against the defendant with costs, and it was determined that A. should sustain the loss by dilapidation, and should pay interest at 4l. per cent. only on his purchase money from the time of filing his bill. *Minchin v. Nance*, 4 Beav. 332.

## SECTION II.

*Tenants at Will.*

*Who are.*—*Not liable.*—*Even where the House falls down.*

*Who are.*—TENANTS-AT-WILL are those who hold merely at the will of another, and whose estates may be determined at any time without notice.

*Not liable.*—The estate of a tenant-at-will being so uncertain, the law imposes no responsibility upon him for dilapidations; the landlord, therefore, has no remedy against him, unless indeed for wilful waste. Co. Lit. 71.; see Countess of Shrewsbury's case, *infra*. In the Countess of Shrewsbury's case it was held, that a tenant-at-will was not liable to an action in consequence of the house being burned down by reason of his negligently keeping the fire. 5 Rep. 13. nom. Salop (Countess) v. Crompton; Cro. Eliz. 777. 784.

In Cruise's Digest, tit. 9. ss. 14, 15., it is said that a strict tenant-at-will is not bound to repair or sustain houses like a tenant for years.

*Even where the House falls down.*—If a tenant-at-will suffer his house to fall down no action lies, for he is not bound to repair; he takes no charge upon him but to occupy and pay rent. Salop (Countess) v. Crompton, Cro. Eliz. 784.

## SECTION III.

*Tenants by Elegit, Statute Merchant or Staple.*

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TENANTS by *elegit*, &c., are not included in the statutes of Marlbridge or Gloucester, and, like tenants-at-will, they are not bound to do any repairs. See Worcester's case (Dean and Chapter of Wyke Co. Rep. 37.; F. N. B. 58.; Bac. Abr. tit. "Waste" (H.)) It is said that if tenants by *elegit* commit waste by cutting timber, &c., they shall account for it to their debtors. F. N. B. 58. H.; Bro. Abr. tit. "Waste," pl. 78.; Norwich (Mayor of) v. Johnson, 3 Mod. 93.



## CHAPTER V.

SECT. I. *Of the Liability of Tenant in Fee-Simple to Dilapidations.*

SECT. II. *Of the Liability of Tenant in Tail to Dilapidations.*

SECT. III. *Of the Liability of Tenant for Life to Dilapidations, and herein of Tenant for Life without Impeachment of Waste.*

SECT. IV. *Of the Liability of Parties standing in the relative positions of Landlord and Tenant for Term of Years, and herein of Tenant for Years without Impeachment of Waste.*

SECT. V. *Tenants in Common, Joint-Tenants, and Coparceners.*

SECT. VI. *Of the Liability of Parties standing in the relative position of Mortgagor and Mortgagee.*

SECT. VII. *Of what Buildings and Parts of Buildings a Covenant to repair has reference.*

SECT. VIII. *Within what Time Repairs must be done.*

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SECTION I.

*Of the Liability of Tenant in Fee-Simple to Dilapidations.*

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*Not liable.*

*Not liable.* — It is quite manifest from the very nature of dilapidations, that unless there be a limited estate, and a person on whom the property will certainly devolve after the due determination

of the particular estate, there cannot exist any right or obligation to repair. Therefore, a tenant in fee simple, who has the absolute property in the land, is not bound to repair, for he cannot commit either dilapidations or waste; he is responsible to no one for the manner in which he uses or treats the estate, and the party to whom he devises it takes it with all its defects. From the foregoing observations it will appear, that it is not requisite that the succession should be vested in any certain person; it suffices if there be a right, which is certain to take effect.

## SECTION II.

*Of the Liability of Tenant in Tail to Dilapidations.*

*Not liable.—After Possibility, &c.*

*Not liable.*—THE same observations apply to tenant in tail as to a tenant in fee simple; and the reason assigned for it is, that the right of the remainder-man, after an estate tail, is so remote and uncertain, that its value cannot be affected by any dilapidations or alterations of the tenements. Tenant in tail may commit waste in houses as well as in all other parts of the estate, notwithstanding any restraint to the contrary; and no instance can be shown where a tenant in tail has been restrained from committing waste by injunction of the court of Chancery. See *Bac. Ab. tit. "Waste" (F)*.

*After Possibility, &c.*—Tenant in tail, after possibility of issue extinct, may be restrained in equity from committing destruction of the premises. *Williams v. Williams*, 15 Ves. jun. 430.

## SECTION III.

*Of the Liability of Tenant for Life to Dilapidations, and herein of Tenant for Life without Impeachment of Waste.*

*Must repair.*—*Cannot make Remainderman contribute.*  
*—Tenant for Life, without Impeachment of Waste, has more extensive Powers than Tenant for Life.*—*Cannot pull down Houses.*—*Where limited.*—*The Effect of Restriction on Right to Timber.*

*Must repair.*—It is laid down that tenant for life is obliged to keep the houses on the estate in repair, even though he be such without impeachment of waste. *Partridge v. Powlet*, 2 Atk. 383.

*And cannot make Remainderman contribute.*—Tenants for life have been refused by the Court of Chancery an inquiry as to whether extensive repairs, such, for instance, as those occasioned by decay and putting on a new roof, would not be beneficial to all parties interested, in order to make the remainderman contribute towards such repair. *Hibbert v. Cook*, 1 Sim. & Stu. 552; *Nairn v. Majoribanks*, 3 Russ. 382. In the former case, however, the vice-chancellor allowed a tenant for life the expense of finishing a mansion house left unfinished by the testator.

*Tenant for Life, without Impeachment of Waste, has more extensive Powers than Tenant for Life.*—It was formerly held that tenant for life without impeachment was merely exempted from being called to account for any waste he might commit or permit, that he had no absolute property. Finche's case, cited 4 Rep. 62, 63. But it was afterwards held, that the words, "without impeachment of waste," not only gave him this exemption, but also conferred upon him a greater interest and more extended powers than an ordinary tenant for life. See Bowles' case, 11 Rep. 12 *b.*; Co. Lit. 220. *a.*

*Cannot pull down Houses.*—If tenant without impeachment of waste attempt to pull down houses, equity will restrain him; and, when they have been pulled down, will compel him to rebuild. Vane *v.* Bernard (Lord) 2 Vern. 739.; S. C. 1 Salk. 161.; see Rolt *v.* Somerville (Lord) 2 Equity Cas. Abr. tit. "Waste," pl. 8.

*When limited.*—The generality of the clause is, however, sometimes limited; and where the lease was made "absque impetitione vasti proviso quod non prosterneret domus voluntarie," and the tenant voluntarily prostrated the houses, and on an action of waste being brought it was objected that the action should have been covenant, for that this proviso could not alter the general nature of the lessee's estate, which was "without impeachment of waste," it was held that these words had

an effect on the lessee's estate, and that he was only a qualified and imperfect tenant without impeach of waste. 9 H. 6. 35. pl. 6.; Plow. 135.

*Effect of Restriction on Right to Timber.*—If it be manifest that the intention was to use the words without impeachment of waste, the court of equity will restrain the tenant from cutting down timber. See *Aston v. Aston*, 1 Ves. 264.

## SECTION IV.

*Of the Liability of Tenant for Term of Years for Dilapidations, and herein of Tenant for Years without Impeachment of Waste.*

*Landlord's Liability where no Contract or Exemption.*—Where there is a Contract to repair.—Where he has agreed to put the Premises in Repair.—To repair at End of Term.—Still liable though Injury caused by the Act of another.—Extent of Obligation on Covenant to rebuild and repair.—Exemption in case of Fire or Tempest.—If Landlord do not covenant to rebuild.—Of the Tenant's Liability.—Must keep Premises in substantial Repair.—Pavement.—Windows.—Inside Painting.—In case of Fire.—Substantial Repairs.—Not liable to put down new Floor.—Nor to pull down and rebuild.—Regard may be had to the State of the Premises when the Term commenced.—Old Premises.—When there was Agreement for a Lease with Covenant to repair, but no Lease made.—Tenant for Years without Impeachment for Waste.

*Landlord's Liability where no Contract or Exemption.*—IN those cases where the tenant has a lease for years of the premises, the landlord receiving an equivalent or compensation for the use of them in the shape of rent, if there be no express contract that the tenant shall keep the premises in substantial repair; or if there be no express exemption from

liability to repair, he is only bound to preserve the premises from occasional and accidental dilapidations.

*Where there is a Contract to repair.*—In *Slater v. Stone*, Cro. Jac. 645., it was held, that a covenant by the lessee that he would, after the repair of the messuages by the lessor, repair them during the term, and leave them repaired, imposed no obligation on him to make the repairs of a dove-house until they had been once repaired by the lessor, though it was in good repair at the commencement of the term. But this has been doubted. It is conceived that it is not law. See 4 By. & Jer. Com. Prec. 381.

*Where he agrees to put Premises in repair.*—But where the words were, "It is agreed that the lessee shall keep the house in good repair, the lessor putting it in good repair created a covenant on the part of the lessee to repair, and that an action lay against him if he did not put it into repair. 1 Esp. 278.; see *Hawkins v. Sherman*, 3 Car. & P. 459.

*To repair at End of Term.*—Where the lessor sold premises subject to a running lease, and bound himself to do repairs at the expiration of the tenancy, he is liable to do the repairs at whatever time and in whatever manner the tenancy determined; and accordingly, in *Horsfall v. Testar* (1 Moore, 89., 7 Taunt. 385.), where the owner had, at the time when he sold the premises, entered into an agreement with the vendee to do all such



: repairs as should be left undone by the tenant (whose term was unexpired) at the expiration of the tenancy, and the tenant had entered into an agreement with the vendee to quit immediately, whereupon the vendee commenced an action against the vendor for not putting the premises in repair at the expiration of the tenancy, according to his covenant, it was held that the words in the declaration, "at the expiration of his tenancy," might be rejected as surplusage, and that it was immaterial when the tenant quitted, because at that time, whenever it was, the defendant might have entered to make the repairs. *Goodson v. Gouldsmith*, 2 Car. & P. 555; per *Best O. J.* 1st, *not* : *And Landlord still liable, although the Injury be caused by the Act of another.* — When the lessor of a house, situate in a borough, covenanted with the lessee to repair all the external parts of the premises except &c., and the corporation pulled down an adjoining house, leaving the wall of the demised house exposed and without support, and thereupon the wall fell down and the house became uninhabitable; and the lessor when called upon to repair refused, and the lessee began to rebuild the wall, and sued the lessor upon his covenant; it was held that the external parts of the premises are those which form the inclosure of them, and beyond which no part extends; and that defendant was liable on his covenant, though the injury to the wall was done in the first instance by the

corporation. *Green v. Eales*, 2 Q. B. 225.; 1 G. & D. 468.

*Extent of Obligation on Covenant to rebuild and replace.*—When the lessor covenanted that he would, in case the premises demised should be burned down, “rebuild and replace” them in the same state as before the fire, he is only bound to restore the premises to the same state as when he let them; and he is not bound to rebuild any additional parts which may have been erected by his tenant. *Loader v. Kemp*, 2 C. & P. 275., per *Best*.

*Exception by Fire and Tempest.*—If the lessor covenant to repair, &c., “casualties by fire and tempest excepted,” it seems the landlord is not bound to repair in either of the excepted cases; *Weigall v. Waters*, 6 T. R. 488.; although the tenant continues liable to rent. *Hare v. Groves*, 1 Anstr. 687.; *Balfour v. Weston*, 1 T. R. 310.

*If Landlord do not covenant to rebuild.*—If the landlord do not covenant to repair, the tenant cannot compel him. *Bayne v. Walker*, 3 Dow. 253. Therefore the tenant has no right to call upon the landlord in such cases to lay out the amount of the sum for which he had insured the premises on their being burned down. *Pindar v. Ainsley*, cit. 1 T. R. 312.

Nor will equity interfere. *Leeds v. Cheetham*, 1 Sim. 146.; *Holtpzaffel v. Baker*, 18 Ves. 115.; see *Hare v. Groves*, *suprà*; and see p. 304.

*Of Tenant's Liability to keep Premises in substantial Repair.*—Although covenants to repair have always been construed more liberally in favour of the landlord than the tenant, yet, on a general covenant to repair, the tenant is only bound to keep the premises in substantial repair: a literal performance is not required. *Harris v. Jones*, 1 Mo. & Rob. 173.

*Pavement & Windows.*—A covenant to leave the premises at the end of the term sufficiently maintained, repaired, paved, and fenced, was held to have been broken when the pavement was out of repair, and the glass in the windows broken. *Pyot v. St. John*, Cro. Jac. 329.

*Inside Painting.*—Under a covenant that the tenant should and would substantially repair, uphold, and maintain a house, he is bound to keep up the inside painting. *Mark v. Noyes*, 1 Car. & P. 265.

*In case of Fire.*—The lessee of a house, on a general covenant to repair, is bound to rebuild in case the house be consumed by an accidental fire.

\* "Pulling down, or prostrating houses, or suffering houses to be uncovered, whereby the spars or rafters, plaunches, or other timbers, become rotten, is waste." *Co. Lit. 232*.  
 "But if the house be uncovered when the tenant occupies it is no waste to suffer the same to fall down. But though it be ruinous, at the tenant's coming in, yet if he pull it down it is waste, unless he re-edifice it againe." *Id.*

*Chesterfield (Earl) v. Bolton (Duke)*, Com. R. 627.; *Bullock v. Dommatt*, 6 T. R. 650.

**Substantial Repairs.**—In the lease of a dwelling-house with the appurtenances, for a term of years, the covenant to keep and leave the house in repair, was held to be satisfied by keeping it in substantial repair, according to the nature of the building; and with a view to determine the relative sufficiency of the repair, the jury may be directed to inquire whether the house was new or old at the time of the demise. *Stanley v. Towgood*, 3 Bing. N. C. 4.; 3 Scott, 313.

In *Belcher v. McIntosh*, 2 M. & R. 186., where the agreement was "to put premises into habitable repair," Alderson B. said, "It is difficult to suggest any material difference between the term 'habitable repair,' used in the agreement, and the most common expression 'tenantable repair': they must both import such a state as to repair that the premises may be used and dwelt in, not only with safety, but with reasonable comfort, by the class of persons by whom and for the sort of purposes for which they were to be occupied."

**Not liable to put down new Floor.**—The tenant being only liable for substantial repairs, he cannot be charged under a general covenant to repair with the extra expense of putting down a new or improved floor. *Seward v. Leggatt*, 7 Q. & M. 613., per Abinger C. B.

**Nor to pull down and rebuild.**—A covenant to

repair does not compel, or even authorise, the lessee to pull down and rebuild, although it does bind him to rebuild in case the premises fall down. *Jones & Cooper v. Verney*, Willes, 175.

*Regard being had to the State of the Premises when Term commenced.* — So where the covenant was, to keep the premises in good and tenantable repair, and to surrender them at the end of the term in like tenantable condition, reasonable wear and tear excepted, *Tindal* C. J., observed, that the meaning of such a covenant was understood to be good tenantable repair, regard being had to the state of the premises in point of age. The landlord is not to have, at the end of the term, a new house at the tenant's expense; the general state and condition of the premises at the time of the demise may be shown, but not matters of detail. *Young v. Muntz*, 6 Sc. 277. See also *Burdett v. Withers*, 7 A. & E. 136.

*Old Premises.* — When the lessee covenants to keep old premises in repair, he is not liable for such dilapidations as result from the natural operation of time and the elements. *Gutteridge v. Munyard*, 1 Mo. & Rob. 334.

*Tindal* C. J. said, in *Muntz v. Goring*, 4 Bing. N. C. 453., "The same nicety of repair is not exacted for an old building as for a new one."

*Where there was an Agreement for a Lease with Covenant to repair, but no Lease made.* — Where, by an agreement for a lease of copyhold premises for

a term of years, to be made as soon as a licence could be obtained from the lord of the manor, defendant covenanted to keep the premises in repair during the said term, and there was a covenant by plaintiff for quiet enjoyment; defendant entered and occupied the premises for the term: it was holden that he was liable on the covenant to repair, though no lease had ever been made to him pursuant to the agreement, nor any licence obtained from the lord for that power. *Pister v. Cator*, 9 M. & W. 315.

*Tenant for Years without Impeachment of Waste.*

Where a lease was made by a bishop for twenty-one years without impeachment of waste, and the tenant cut down none of the trees until about the end of the term, when he began to fell them, the Court of Chancery granted an injunction. *Abraham v. Bubb*, 2 Freem. 64.; *Evelyn's case (Lady)*, 2 Swanst. 172.

## SECTION V.

*Tenants in Common, Joint Tenants and Coparceners.*

**Answerable for voluntary Waste.** — There is a mutual obligation on the part of tenants in common, or joint tenants, to use the premises in such a manner as not to interfere with, or prejudice the right of their fellow's user for voluntary waste, therefore each is answerable; though it is obvious, for permissive waste they are not responsible, each having the same power to prevent the decay by timely reparation, and the neglect to do so is as much the default of one as the other; but each is bound to contribute towards the reparation of decay caused by time, &c.

If tenants in common have different estates, thus, one in fee and the other for years, the tenant in common in fee can call upon the other to contribute towards tenantable repairs.

If tenants in common, or joint tenants, have only an estate for life or years, it is their duty to the lessor to keep the premises in tenantable repair.

**Action of Waste.** — At common law an action of waste was not maintainable between tenants in common and joint tenants. The stat. of West-

minster 2., 13 Ed. 1. c. 22., gave a writ of waste for one tenant in common or joint tenant of a wood, turbary, or the like.

*Coparceners.* — The above statute did not extend to coparceners, nor does it seem that coparceners are, at law, compellable to contribute towards the repairs of houses, &c., because any of them might at common law have enforced a partition, which a tenant in common or a joint tenant could not. See 2 Inst. 403.; and Bac. Abr. tit. "Waste" (G).



## SECTION VI.

*Mortgagor and Mortgagee.*

*Mortgagee bound to repair. — But not when Decay caused by Time, &c. — Alterations. — Right to Timber.*

*Mortgagee bound to repair. —* WHERE land is held as a pledge, that is, in cases of mortgage, the mortgagee is bound to preserve the premises from occasional or accidental dilapidations, and, as his occupation is not for the purpose of making any profit of the land, but merely to hold it as a pledge, the mortgagor is bound to repay the sum expended in repairs.

A mortgagee, like another tenant, is bound to keep the buildings and other parts of the estate in ordinary repair. *Godfrey v. Watson*, 3 Atk. 517.

And the Court of Chancery will compel him to do so. *Id.*

Where the mortgagee had burned wainscot, the Court ordered him to deliver up possession on receiving security to pay what was due. *Harrison v. Derby*, 2 Vern. 392.

*But not when Decay caused by Time, &c. —* But

he is not liable for gradual decay, the effects of time. *Russell v. Smithies*, 1 Anst. 96.

*Alterations.*—The mortgagee may pull down ruinous buildings and erect better ones, to prevent a forfeiture; but he cannot alter the mortgaged premises. *Hardy v. Rees*, 4 Ves. 480.

*Right to Timber.*—It would seem that when the land is of insufficient security, the mortgagee may cut down and sell timber. *Withrington v. Banks*, 8 Sol. C. C. 31. But otherwise he has no right to do so, and the Court of Chancery will restrain him by injunction. *Farrant v. Lovel*, 3 Atk. 723.

The mortgagor cannot cut down timber. *Hampshire v. Harrison*, 1 J. & W. 581. See *Fairfield v. Weston*, 2 Sim. & Stu. 96; but see *Hippesley v. Spencer*, 5 Mad. 422.

## SECTION VII.

*To what Buildings and Parts of Buildings a Covenant to repair has Reference.*

*It extends to every Portion of the Premises. — Veranda. — Millstones. — Racks. — If Building not fixed in Soil. — Where Lease Renewed. — Building Leases. — Age of Premises. — Glass Windows. — Accidents unavoidable. — In case of Fire. — Tempest. — Floods. — Wear and Tear. — Painting. — How Covenant construed. — Age of Premises. — What amounts to a Breach. — Making Doorway into adjoining House. — Enlarging Windows, &c. — New House must be like the old one. — Converting Chambers into one. — Boundary Walls. — Party Walls.*

*It extends to every Portion of the Premises. —*  
**COVENANTS** being construed strictly in favour of the lessor, extend not only to all such buildings as are erected during the term, but also to every portion of the demised premises. See 1 Esp. N. R.

277.

A covenant to leave a house and land in good repair at the end of the term, and the lessee erect a messuage upon part of the land; he must leave that in repair also. Bac. Abr. "Covenant" (F).

*Veranda.* — And such covenants include a veranda, the lower part of which was attached to

posts fixed in the soil. *Penny v. Brown*, 2 Stark. N. P. 403.

*Millstone.* — As also a millstone. *Master v. Bradley*, 9 Bing. 24., 2 M. & Scott, 25.

*If not fixed in Soil.* — If, however, the buildings erected be solely for the purposes of trade and manufacture, and are not let into the soil, but merely rest on blocks or pattens, the covenant does not extend to them. *Nayler v. Collinge*, 1 Taunt. 19.; and see *ante*, p. 4, 5.

*Where Lease renewed.* — When a tenant erects fixtures for the purposes of his trades on the demised premises, and afterwards takes a new lease, to commence on the expiration of the former, with a general covenant to repair, he is bound to repair the fixtures. *Thresher v. East London Water Works Co.*, 2 B. & C. 608., *ante*, p. 95. Racks are included in a covenant to repair stables, although the declaration did not show that they were fixed to the freehold. *Anon.*, 2 Vent., 214.

*Building Leases.* — When a lessee, in a lease of three messuages, covenanted to pull down the houses and rebuild three others, and to repair the houses so agreed to be rebuilt, and also that he would repair the demised premises, and leave the said premises in repair; and he pulled down the three and built four in their stead, it was held, that though he was obliged to build only three houses, yet he was bound to deliver up all in repair, the

last covenant being general, and not confined, as the former, to the houses agreed to be built. *Douse v. Earle*, 3 Lev. 264. 2 Vent., 126. See *Brown v. Blenden*, Skin. 121.

The lessee covenanted within two years from the date of the lease to put four messuages in good repair, and keep them in repair during the term, and further, within the first fifty years of the term to take down the messuages, as occasion may require, and in the place thereof, to erect four new messuages: the Court of Common Pleas intimated that if, within the fifty years, the houses should be so repaired as to make them completely and substantially as good as new houses, the occasion on which the new houses were to be built did not arise. *Evelyn v. Raddish*, 7 Taunt. 411., 11 Felt., 543.

If a lessor covenant in a lease with his lessee that he will, in case the premises demised shall be burnt down, "rebuild and replace" the same, in the same state as they were in, before the fire, he is only bound to restore the premises to the state in which they were when he let them, and not rebuild any additional parts, which may have been erected by his tenant. *Loader v. Kemp*, 2 Car. & P. 375.

When the lessee covenanted to lay out a specific sum on the demised premises, within a given period, in erecting and rebuilding messuages, and the same so to be erected, and all other houses thereafter to be erected, to repair, and the de-

demised premises, with all such other houses so well repaired, at the end of the term to yield up: the Court held, that the liability of assignee did not extend to buildings erected on the premises at the time the lease was granted, because the intention evidently was to remove those and erect others in their place; and the landlord, not having insisted on the lessee erecting new houses within the given period, could not call upon the assignee to repair the old and dilapidated buildings which he had neglected to take down. *Lant v. Norris*, 1 Burr.

207. *Agricultural.*—In leases of farming lands and premises the covenants on the part of the lessee are usually expressed to repair, and deliver up in repair, all the buildings on the demised premises, and all erections to be placed thereon during the term, and the kilns, mills, &c., as specified in the schedule usually annexed to or written under the lease: there is nothing different in the construction of those covenants to repair from those inserted in town leases, which cases will apply to the present subject.

*Glass Windows.*—It has been shown that a tenant for years is bound to do all tenantable repairs; and, therefore, if glass windows, though glazed by himself, be broken down or carried away, it is waste, for the glass is part of the house. *Co. Lit.* 53. a. It is not usual for surveyors to charge

for cracked glass as dilapidation: it would appear, however, that as the tenant is bound to leave the premises as he found them, he ought to replace all cracked panes of glass.

*Accidents.* — An accidental dilapidation is said to be that which takes place suddenly and imperceptibly, and for these the tenant is not it would seem liable.

But if the dilapidation be such as can reasonably be prevented, whether it be committed by the tenant or a mere stranger, the tenant will be liable.

*Unavoidable Accident of the Elements.* — In case of Fire. — Tenants for life or years, after they were made liable by the statute of Marlbridge for permissive waste, were obliged in cases of fire to rebuild. (Co. Lit. 687. a. But the 6 Ann. c. 31. s. 6., made perpetual by 10 Ann. c. 14., provides, that no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, or any recompence be made by such person for any damage suffered or occasioned thereby; and the 7th section provides that nothing therein contained shall extend to defeat or make void any contract or agreement made between landlord and tenant.

Under a general covenant to repair, and leave in repair at the end of the term, the lessee or assignee is liable to rebuild in case of the destruction

of the premises by accidental fire. *Chatterfield (Earl) v. Bolton (Duke)*, Com. R. 267.; *Poole v. Archer*, Skin. 210.; *Bullock v. Dommitt*, 6 T. R. 650., 2 Chit. 608. See *Digby v. Atkinson*, 4 Camp. 275.; *Phillipson v. Leigh*, 1 Esp. 398.

When there is the usual covenant to repair, as well as a covenant to insure against fire for a specific sum, on the premises being burned down, the liability on the covenant to repair is not limited to the amount of the sum for which the premises had been insured under the covenant. *Digby v. Atkinson*, 4 Camp. 275.

Nor will the lessor be compelled to rebuild, and if he voluntarily insure the premises, it will make no difference. *Leeds v. Cheeseman*, 11 Sim. 146. See *Weigall v. Waters*, 6 T. R. 488.

*Tempest.*—It may be observed that, in general, waste which is the act of God is excusable; thus, if a house fall by tempest, the tenant may be excused in action of waste. Bac. Abr. tit. "Waste" (D). Likewise, if a house be abated by lightning, or thrown down by a great wind, it is not waste. *Id. Inst.*, 55. a.

*Floods.*—Where there is a general covenant to repair and leave in repair, the lessee is bound to repair the injury done by extraordinary floods, because it is the party's own fault to bind himself to a duty of this kind; if he had chosen it he might have guarded against it: he should have made an exception in his lease to that effect; and as he did not;



he is bound to make good any loss, notwithstanding it be sustained by an accident the result of inevitable necessity. *Brecknock Co. v. Pritchard*, 6 T.R. 750.

There is now generally an exception of accidents by fire and tempest introduced into leases, in order to protect the lessee from this obligation, and under this covenant and exception

It was held, that when the house was burned down, and the lessor who insured the premises had received the insurance money, but neglected to rebuild, an injunction might be granted against an action at law for the rent, until the house was rebuilt. *Brown v. Quilter*, Ambler 619.

*Effect of Covenant.* — The effect of the covenant is only to protect the lessee against the repairs; he remains liable for the rent\*, although the landlord will not rebuild them, and it seems doubtful whether the landlord is bound to repair in the excepted cases. *Wiegall v. Waters*, 6 T. R. 488.

*Wear and Tear.* — But this general liability of a tenant for all accidents resulting from his covenant to repair, does not impose upon him the obligation of supplying those defects which are the natural consequences of wear and tear. For the effects of time and use he is not responsible unless

\* *Hare v. Groves*, 3 Anst. 687., and the tenant will not be relieved from this obligation even in equity. *Holtzaffel v. Baker*, 18 Ves. jun. 116.

this natural decay have been occasioned by neglect, through which the buildings have become uninhabitable. His duty, however, is to leave the premises in tenantable repair, and from this duty he is not excused by the circumstance of the premises not being in repair when he entered upon them.

*Painting.*—Under a covenant substantially to repair, uphold, and sustain, the tenant is bound to keep up the inside painting. *Marke v. Noyes*, 1 Q. B. P. 265.; per *Abbott C. J.*

*How Covenant construed.*—A covenant to repair must be construed with reference to the state of the premises at the time the covenant began to operate; and therefore, where an under-lease had been made with the same covenants as those in the original lease, allowing an interval between them, it is clear that the covenants would not have the same effect, but would vary substantially in their operation, for the sub-lessee is only bound to put the premises in the same condition as he found them at the time of the lease to him. See per *Parke B.*, in *Hatton v. Walker*, 10 M. & W. 257, 258., and the cases there cited.

*Age of Premises.*—In construing a covenant to repair, the nature and condition of the premises as to age, &c. ought to form a subject of consideration. *Tindal C. J.* told the jury, that the defendant was only bound to keep up the house as

an old house, and not to give the tenant the benefit of new work. *Harris v. Jones*, 1 M. & R. 173.

In another case his Lordship most clearly lays down the law in the following words: "Whenever an old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the tenements do not suffer more than the operation of time and nature would effect. He is bound, by reasonable application of labour, to keep the house as nearly as possible in the same condition as when it was demised. If it appear that he has made these applications, and laid out money from time to time upon the premises, it would not perhaps be fair to judge him very rigorously by the report of a surveyor, who is sent upon the premises for the very purpose of finding fault." *Gutteridge v. Munyard*, Id. 334. See *Stanley v. Toogood*, 3 Bing. N. C. 4.

*What amounts to a Breach.* — The lessee is not justified in making any alteration in the demised premises, for the lessor ought to receive possession of the premises in the same state at the expiration

of the term as they were in when the estate was created; time and use only excepted. Besides, the tenant has only the right of user, which cannot confer any power to alter the premises; thus, —

*Making Door-way into an adjoining House.* — Breaking a doorway through the wall of a demised house into an adjoining house is a breach of the general covenant to keep in repair, and so is the continuing it so broken. *Doe d. Vickery v. Jackson*, 2 Stark. 293.

*Enlarging Windows, &c.* — But under a covenant to repair and keep in repair a dwelling-house, together with all such buildings, improvements, or additions as should be erected, set up, or made by the lessee, it was held no breach to enlarge the windows, to open external doors, and to take down partitions. *Doe d. Dalton v. Jones*, 1 Nev. & M. 6., 4 B. & Ad. 126.

A covenant to repair does not compel or even authorise the lessee to pull down and rebuild, although it does bind him to rebuild in case the premises fall down.

*New House must be like old one.* — The pulling down a house and rebuilding it in a different fashion, though the new one be more valuable than the old, is nevertheless a breach of covenant. 2 Rpl. Abr. 815. pl. 17.

So converting a brewhouse into tenements of greater value is waste. *Cole v. Green*, 1 Lev. 311.

*Converting two Chambers into one.*—(55) converting two chambers into one is waste, or *converso*, or converting one handmill into a horse-mill. (Grave's case, *Græme v. London (City)*) Cro. Jac. 182., Co. Lit. 53 a. n. 18.

*Boundary Walls.*—Where the lessor covenanted to repair the external parts of the demised premises, he is bound to repair the boundary walls, although adjoining other buildings, and he must compensate the lessee for damage sustained by reason of his neglect to repair such wall, even though the injury sustained be occasioned by the pulling down of an adjoining building (*Green v. Eales*, 1 Q. & D. 468, 2 Q. B. 225.)

*Fence, Walls, &c.*—A covenant by a lessee that he will during the term repair, uphold, support, sustain, and maintain the brick walls to the demised premises belonging, is broken if he pull down a brick wall which divides the court-yard at the front of the house from another yard at the side of the house. (*Doe d. Wetherall v. Bird*, 6 Car. & P. 195. S. C., 2 Nev. & M. 285.)

*Party Walls.*—A tenant at rack-rent who has covenanted to repair, is not liable to the repair of party-walls under the Metropolitan Building Act. (14 G. 3. c. 78.), as that statute throws the liability upon the owner of the improved rent. (*Southall v. Leadbitter*, 3 T. R. 458., 2 Har. & Ed. N. P. 1034. Nor under the Metropolitan Buildings

Act (7 & 8 Vic. c. 84.), for this statute places that liability on the lessor.

If the lessee covenant to support and maintain the brick walls belonging to the premises, and he pulls down a brick wall which divides a front court-yard from another court at the side of the house, it will be a breach of his covenant. *Doe d. Wetherall v. Bird*, 6 C. & P. 195. See *London (Corp.) v. Venable*, Id. 196.

In *Wood v. Avery*, 2 Leon. 189., where the lessee covenanted to maintain, sustain, and repair two messuages, and for the performance of this covenant he gave a bond, upon which an action was brought, to which he pleaded that he had repaired all the messuages except the kitchen, which was so ruinous that he could not repair it, but that he pulled it down and built another in as short a time as possible, and that he had at all times well repaired the new kitchen, and on demurrer to this plea, the Court held, that although it would have been good in an action of waste, yet it was bad to that action upon a covenant by which he had tied himself down to an inconvenience which he ought at his peril to provide for.

## SECTION VIII.

*Within what Time Repairs must be done.*

*Liability commences with Lease. — When Notice required. — When there is some Preliminary Act to be done. — Leasee liable during the Term. — After Expiration of Lease. — Where Notice is required. — Landlord's Right to enter to repair. — Action on the Case.*

*Liability commences with Lease. —* It may be observed that, generally, the liability under a covenant to repair commences with the lease.

*When Notice required. —* When however a tenant covenanted to repair at all times, when, where, and as occasion shall require during the term, and at farthest within three months after notice, it was held that the tenant was not bound to repair until after notice given. *Horsfall v. Testar*, 7 Taunt. 385. See *Doe d. Rankin v. Brindley*, 4 B. & Ad. 84.; and see *post*, p. 312.

But where the lease contained a covenant to keep the premises in repair, and to repair within three months after notice the covenants are to be considered distinct, and there is a general obligation to repair, without notice. *Wood v. Day*, 7 Taunt. 646.; see *Roe d. Goatly v. Paine*, 2

Campb. 520. ; Doe d. Morecroft v. Meaux, 4 B. & C. 606.

*Where there is some preliminary Act to be done.*

—When the lessee covenanted to lay out a certain sum within fifteen years in erecting and rebuilding of messuages or tenements, or some other buildings upon the ground and premises, and from time to time and at all times all and singular the said messuages or tenements so to be erected, with all such other houses, edifices, &c. to repair, &c., and the said demise premises, with all such other houses, &c., so well repaired, &c., at the end or sooner determination of the said term to deliver up, &c. ; it was held, that the covenant to repair was not obligatory until the premises were rebuilt, Lant v. Norris, 1 Barr. 287.

*Lessee liable during the Term.* — Upon a covenant to repair and keep in repair during the term, the lessee is subject to an action if the premises are at any time during the term out of repair. *Luxmore v. Robson*, 1 B. & C. 584., 1 B. & Ad. 584. ; but see *Main's case*, 5 Rep. 21., F. N. B. 145., *Shep. Touch.* 173. A covenant to repair by a certain day would not, it seems, be broken if there were any thing of importance (as a plague in a house) to prevent the repairs being completed ; but they must be done within a convenient time afterwards. *Griffith's case*, *Moore*, 69., *Shep. Touch.* 174. *Main's case*, 5 Rep. 21.

*After Expiration of Lease.* — But the liability



does not cease with the determination of the term, for if the lessee holds over after the lease expires, he will be taken to hold under the same term ; and therefore, if, during such occupation, the premises be burned down, he will be bound by the terms of the expired lease to rebuild. *Digby v. Atkinson*, 4 Campb. 275.

But when the covenants were to yield up the premises in good repair at the end of the term, and not to convert and alter the premises, but to deliver them up in the same state as when the lease was granted, and it appeared that the buildings were altered during the term, and were dilapidated at the end of the term, and the tenant held over, but during the yearly tenancy no dilapidations happened, it was held that the tenant was not liable on the implied agreement for those alterations and dilapidations, because they were breaches of the covenant in the lease, which the yearly tenancy did not impose the duty of repairing. *Johnson v. St. Peter, Hereford (Churchwardens)*, 4 N. & M. 186.

*Where Notice is required.* — The covenants to repair generally, and within a given time after notice, are distinct and independent covenants, if they cannot be taken together so as to make the sentence complete, which they will do when they follow each other ; but should they be found in different parts of the lease, then they must be taken as distinct ; when they follow each other,

and are to be taken as one complete sentence, the latter part respecting notice is held to qualify the former. *Horsefall v. Testar*, 1 Moore, 89., 7 Taunt. 385.; *Wood v. Day*, 1 Moore, 389., 7 Taunt. 746.; *Roe d. Goatly v. Payne*, 2 Campb. 520. See *Doe d. Morecroft v. Meux*, 4 B. & C. 606., 7 D. & R. 98., 1 Car. & P. 346.

A covenant to repair during the term, after three months' notice, and to leave the premises in repair at the end of the term, are held to be separate and distinct covenants; and therefore notice is not necessary to sustain an action for non-repair at the end of the term, for the notice refers only to reparations within the term, to which the lessee is not tied without notice three months before. 1 Saund. 664.; *Luxmore v. Robinson*, 1 B. & Al. 584.

Where the lease contained a covenant by the lessee to keep the premises in repair, and also to repair within three months after notice; and there was a clause of re-entry for a breach, and the premises being out of repair, the lessor gave notice to repair within three months, and brought an action of ejectment before the expiration of the three months, but received rent which accrued due after giving the notice; the lessor was held to have waived the forfeiture incurred by the first breach, and a distinction was taken where the notice was to repair forthwith. See the cases above cited. But see *Goatly v. Paine*, *suprà*.

*Landlord's Right to enter to repair.* — A landlord has no right to enter his tenant's premises to repair them, without some stipulation to that effect; he must resort to his remedy by action. *Barker v. Barker*, 3 Car. & P. 557.

In *Heale v. Wyllie*, 3 B. & C. 533., where the tenant under a lease containing a covenant to repair, underlet the premises to one who entered into a similar covenant, and the original lessor brought an action on this covenant in the first lease, and recovered, it was held that the damages and costs recovered in that action, and also the costs of defending it, might be recovered as special damages in an action against the undertenant, for the breach of his covenant to repair.

But this decision would seem to be much shaken by *Penby v. Watts*, 7 M. & W. 601.; and indeed subsequently overruled by the Court of Exchequer, in the case of *Walker v. Hatton*, 10 M. & W. 249., the facts of which case were these: — A messuage and premises were demised to the plaintiff by a lease bearing date the 10th of May, 1828, for the term of twenty-one years from the 25th of March then last, which lease contained covenants to paint the outside of the premises once in every three years, and the inside once in every seven years, and to repair and keep in repair the premises, and also to do any repairs which, on a view of the premises by the lessor, should be found wanting, of which notice should be given.

By a lease dated the 15th of June, 1830, the plaintiff demised the premises to the defendant for the residue of the term wanting ten days, containing covenants, with the exception of a stipulation as to painting the outside wood-work, in precisely the same terms as those contained in the original lease. The original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to perform the repairs, and for instructions as to the course he should pursue with respect to the defence of the action. The defendant denied that any notice to repair had been given, and insisted that the premises did not require it; the plaintiff thereupon offered to suffer judgment by default, which the defendant refused to assent to. The plaintiff then gave the defendant notice, that as he had denied that any notice to repair had been served, and insisted that the premises were not out of repair, he should traverse the breaches of covenant assigned, and try the question, holding the defendant responsible for the costs; this he accordingly did, and the result was that the original lessors recovered 68*l.* damages, and 58*l.* 12*s.* costs, and he himself incurred costs amounting to 53*l.* 14*s.* 4*d.* Held, that the plaintiff was not entitled to recover from the defendant the costs of defending the action, as they were not necessarily occasioned by the defendant's breach of the

covenant to repair.\* *Walker v. Hatton*, 10 M. & W. 249.

But if by the terms of the lease the estate be forfeited by the neglect to repair, as the lessor may enter and avoid the lease, it would seem he may enter and do the repairs without avoiding the lease. At all events, if the repairs be absolutely requisite to be done, to prevent a forfeiture of the estate, he may recover all the money he lays out in the necessary repairs, as damages sustained by him in consequence of his tenant's breach of contract. *Colley v. Streeton*, 2 B. & C. 273.; *Gib. on Dilapidations*, 87.

The lessor or reversioner may at common law enter upon the premises for the purpose of viewing the state of the premises; and if the tenant obstruct him, he is liable to an action on the case. *Hunt v. Dowman*, Cro. Jac. 478. Giving him notice, however. *Doe d. Wetherell v. Bird*, 6 C. & P. 195.

When a lessee who was bound by a covenant to repair premises demised to him, underlet part of them with a similar obligation by his tenant to repair them within three months after notice given to him for that purpose, and the premises underlet becoming out of repair, the superior landlord gave notice to his immediate tenant to

\* *Semble*, that the plaintiff ought to have paid the amount of the dilapidations into court, instead of defending the action. *Id.*

repair them, at the peril of forfeiting his lease; and the under tenant, after receiving notice to repair, neglected to do so within three months; whereupon the lessee, in order to avoid a forfeiture of his whole estate, entered on the premises and put them in tenantable repair; it was held, that his undertenant was liable to pay him the whole expense so incurred, although the former had sold his interest in the premises to a purchaser who had entirely rebuilt them before the action for the recovery of such expense was brought. *Colley v. Streeton*, 3 D. & R. 522., 2 B. & C. 273.

*Action on the Case.*—An action on the case for waste may be brought by the lessor during the term. *Oxford (Q. C. Provost) v. Hallett*, 14 East, 489. But the dilapidation must exist at the time of action brought. *Whelpdale's case*, 5 Rep. 119. *l.* See *Walton v. Waterhouse*, 3 Saund. 420.

## CHAPTER VI.

*Of the Legal, Equitable, and other Remedies in  
respect of Dilapidations.*

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- SECT. I. *At whose Suit.*  
 SECT. II. *Action on the Case.*  
 SECT. III. *Assumpsit.*  
 SECT. IV. *Debt.*  
 SECT. V. *Action of Ejectment.*  
 SECT. VI. *Action of Covenant.*  
 SECT. VII. *By Suit in Equity.*  
 SECT. VIII. *Other Remedies.*  
 SECT. IX. *Of Tenant's Remedies.*
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## SECTION I.

*At whose Suit.*

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*Heir.—Assignee of Reversion and Lessor—Assignee of  
Part of the Reversion.—Executors.—In Case.—Against  
whom.—Heir.—Assignee of Lessor and Lessee.—Exe-  
cutor, &c.—In Case.*

*Heir.*—THE heir brought covenant upon the lease of his ancestor, wherein the lessee covenanted with the lessor, his executors and administrators, to repair and leave in repair; and on demurrer it was held, that this was a covenant which runs with the land, and goes to the heir without naming him. *Lougher v. Williams*, 2 Lev. 92. See *Salt v. Kitchingham*, 10 Mod. 158. See 1 Chit. Pl. p.116.

*Assignee of Reversion and Lessor.* — Covenants to repair run with the land, and are binding as well on the parties covenanting as on the assignee of his interest, and may be taken advantage of by the assignee of the reversion as well as by the lessor himself. See *Harley v. King*, 5 Tyrwh. 692.

The assignee of the reversion can only sue for breaches of covenant committed after he had purchased the reversion. So when A. demised to B. for a term of years two messuages, and the lease contained a covenant by B. that he would during the term keep the premises in repair, and leave them at the end of the term in good repair, and in the same state as they were in at the beginning, the tenant converted them into a single house, and left them at the end of the term out of repair; and B. held on without a fresh lease: afterwards C. purchased the reversion of A.; and under him B. continued to hold; the Court decided that B. was not liable in assumpsit on an implied contract to put the messuages in such repair, and in the same state, as they were in at the commencement of the term; but that, supposing B. so liable, C. had no right of action for breaches of the contract committed before he purchased the reversion. *Johnson v. Hereford, St. Peter (Churchwardens)*, 4 Ad. & E. 520., 4 N. & M. 186.

An assignee of part of the reversion may maintain an action of covenant. *Twynam v. Pickard*,



2 B. & Al. 105. See *Henniker v. Turner*, 4 B. & C. 157.

*Executors, &c.* — The executors and administrators of the party originally having a right to sue on these covenants, may sue for the breach of any which may have been committed. See *Buckley v. Pirk*, 1 Salk. 317.

*In Case.* — By the 3 & 4 W. 4. c. 42. s. 2. it is enacted, that actions of trespass or case may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such person, and provided that such action shall be brought within one year after the death.

*Against whom.* — *Heir.* — An heir may be declared against as assignee. *Derisly et al. v. Constance*, 4 T. R. 75.

The assignee of the lessee, as well as his executor or administrator, although he be not mentioned in the deed, is liable on a covenant. *Buckley v. Pirk*, 1 Salk. 317.; *Bacheloure v. Gage*, Cro. Car. 188. See *Lant v. Norris*, 1 Bur. 287., 1 Chitt. Plead. 116.

The assignee of a lease is liable for breach of a covenant to repair committed during his own possession, though he may have assigned the premises before the action was commenced. *Harley v. King*, 5 Tyrwh. 692.

The covenant to repair extends to every part of the demised premises; the assignee of any part, therefore, is liable under the covenant for not repairing that part. *Conynham v. King*, Cro. Car. 221. See 1 Chitt. Plead. 16. See also Spencer's case, 5 Rep. 16. But the assignee is not liable on a covenant by the lessee to do a specific thing within a given time, and the covenant be broken before the assignment. *Glascott v. Green*, 1 Salk. 199. See *St. Saviour (Churchwardens) v. Smith*, 1 Bl. R. 351.; *Johnson v. St. Peter, Hereford (Churchwardens)*, 4 N. & M. 186.

*Executor.* — So may an executor for a breach of covenant after he became interested. *Buckley v. Pirk*, 1 Salk. 316. See 2 Chitt. Plead. 367. n.

*Underlessee.* — An underlessee cannot be sued in covenant or debt on the original lease. *Holford v. Hatch*, Dougl. 183. 445. See *Hare v. Cater*, Cowp. 766.

*In Case.* — The 3 & 4 W. 4. c. 42. s. 2. enacts, that actions of trespass or case may be maintained against executors or administrators for any wrong committed by the deceased in his lifetime to another, in respect of his property real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects.

## SECTION II.

*Action on the Case.*

*General Observations.*—*Action on the Case.*—*Commissive Waste.*—*Tenant by Sufferance.*—*Permissive.*—*When Action may be brought.*—*Before Repairs done.*

*General Observations.* — DILAPIDATIONS, being voluntary or permissive, are in legal consideration either a wrongful act or misfeasance, and an injury to the reversionary estate, or merely a breach of contract. In the former case, the remedy would be by an action on the case in the nature of waste for the injury done to the reversion. In the latter case the remedies are various, according to the nature of the contract between the parties. Thus, if the landlord rely on the general implied liability to keep the premises in tenantable repair, or on a mere parol agreement, whether verbal or scriptory, the proper form of action would be *assumpsit*. If, however, he rely upon a covenant under seal, then the form of action would be *covenant*; and it would seem that for voluntary waste he may have, at his election, either, an action on the case or on the contract, after the expiration of the term. *Kinlyside v. Thornton et al.*, 2 Bl. R. 1111. It has been held, however, that a lessee

for years is not liable in an action on the case for permissive waste, for he is only bound to repair by virtue of his contract. See *Gibson v. Wells*, 1 New Rep. 290.; *Jones v. Hill*, 7 Taunt. 392.; *Herne v. Benbow*, 4 Taunt. 764. But see the older authorities, Lit. s. 71., Co. Lit. 53 a. 57 a. n. 1.

If the compliance with the covenant be secured by a penalty or by a collateral instrument, as a bond, debt will lie.

Or, by the terms of the agreement, the neglect or refusal to repair may amount to a forfeiture, in which case the landlord's remedy would be by action of ejectment to recover possession of the premises.

But there is a preventive means by which a tenant may be restrained from committing waste, and that is, by injunction in the Court of Chancery. This remedy may, and indeed can, only be resorted to where serious injury is threatened.

There is still another remedy, of a different nature to those already alluded to, of which at common law the reversioner may avail himself, and that is, by his right to enter on the premises, and view the state of repair. Of each of these in their order, and first of

*An Action on the Case.* — Dilapidations may be treated as a tort, for they are in contemplation of law a wrongful act on the part of the tenant: the breach of covenant therefore is a misfeasance, for

which an action on the case will lie, as for an injury to the reversion.

*Reversionary Interest must be injured.* — It must, however, be perfectly clear that the reversionary interest of the plaintiff has actually been injured, either by diminishing the value of the property, or affecting the evidence of the plaintiff's title thereto. *Young v. Spencer*, 10 B. & C. 145. See *Harrow (School Governors) v. Alderton*, 2 B. & P. 86.

*Commissive Waste.* — An action upon the case in the nature of waste, to the injury of the reversion, is certainly maintainable for *commissive waste*, by a reversioner against his tenant or a stranger. 1 Saund. 323. a., 2 Id. 252. b. And where the lessee even covenants not to do waste, the lessor has his election to bring either an action on the case or of covenant against the lessee for wilful waste done by him during the term. As, where a lease was made for twenty-one years, in which the lessee covenanted to yield up the premises repaired at the end of the term, the lessee during the term committed wilful waste, and at the expiration thereof delivered up the premises to the lessor in a ruinous condition: afterwards the lessor brought an action on the case against the tenant for waste committed by him during the term, and it being objected at the trial that the plaintiff ought to have brought an action of covenant, and not on the case, a verdict was found for the plain-

tiff, subject to that point. But the Court of Common Pleas was clearly of opinion that an action on the case was maintainable, as well as covenant, and the Chief Justice said, "Tenant for years commits waste and delivers up the place wasted to the landlord; had there been no deed of covenant, an action of case in the nature of waste would have lain. Because the landlord by the special covenant requires a new remedy, does he therefore lose his old?" *Kinlyside v. Thornton*, 2 Bl. R. 1111., 2 Saund. 252. b. 6th ed., 5 Bing. N. C. 694.; *Muskett v. Hill*, 7 Scott, 855.; S. C. per *Tindal C. J.*

*Tenant by Sufferance.*—A landlord may sue a tenant holding over by sufferance for wilful waste. *Burshall v. Hornsby*, 1 Campb. 360.

*Permissive Waste.*—Some recent decisions have made it doubtful whether an action on the case for permissive waste \* can be maintained against any tenant for years. See *Gibson v. Wells*, 1 N. R. 290.; *Herne v. Benbow*, 4 Taunt. 764.; *Jones v. Hill*, 7 Taunt. 392., 1 Moore, 100.; see 2 Saund. 252. n. i.

*When Action may be brought.*—It was formerly doubted whether an action on the case for waste would lie during the term. See *Main's case*, 5 Rep. 21. a., in which the negative was held. But

\* Under an allegation of voluntary waste, proof of permissive waste is not allowable. *Martin v. Gilham*, Jur. 920.

it is now settled, that waste being a present injury to the lessor, he has a right to have his premises kept in repair during the whole term, and if at any time they be in a dilapidated state, he may have an action on the case. Oxford (Q. C. Provost) *v.* Hallett, 13 East, 589.

*Before Repairs done.* — In order to maintain this action, it is requisite that the dilapidations should continue, for although an injury accrues to the landlord if the premises are out of repair at any time during the term, and the tenant's obligation be broken, yet if they are put into repair before the landlord complains, the injury and right of action no longer exist. Whelpdale's case, 5 Rep. 119 b.

But it must appear by whom the repairs were done. Walton *v.* Waterhouse, 3 Saund. 420.

## SECTION III.

*Of Assumpsit.*

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*When proper Remedy. — Parol Contract. — Implied Contract.*  
*— Tenant overholding.*

*When proper Remedy.* — WITH regard to the action of assumpsit for dilapidations or want of repair, it may be observed that this is the proper remedy when the contract is either by parol or implied.

*Parol Contract.* — And where there is an express agreement not under seal between the parties as to repairs, the action for the breach should be on the agreement, stating mutual promises and the breaches complained of, in the term of the agreement.

*Implied Contract.* — When the action is brought on the implied contract to maintain the buildings in a tenantable manner, attention must be paid in describing the liability, because if the contract be not such as arises from the relation of landlord and tenant the declaration will be bad. *Brown v. Crump*, 1 Marsh. 567., 6 Taunt. 300.

*Tenant overholding.* — A. demised to B. for a term of years two messuages: B. covenanted during



the term to keep the premises in repair, and leave them at the end of the term in good repair, and in the same state as they were in at the beginning; at the end of the term the messuages were out of repair, and had been converted into a single house, B. held on without a fresh lease, and C. afterwards purchased the reversion of A., and B. continued to hold on under C. :—Held, that B. was not liable in assumpsit on an implied contract to put the premises in such repair, or in the same state as they were in at the commencement of the term; that supposing B. so liable, C. had no right of action for breaches of the contract committed before he purchased the reversion. *Johnson v. St. Peter Hereford (Churchwardens)*, 4 Ad. & E. 520.

*At what Time Action may be brought.*—It would seem that the lessor may maintain during the term an action of assumpsit. See *Luxmore v. Robson et al.*, 1 B. & Al. 584.

## SECTION IV.

*Debt, &c.*

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*Debt.*—WHERE the performance of the covenant to repair is secured by a penalty or by a bond in a penalty, debt will lie for the recovery of the amount of the penalty. But as in debt merely nominal damages are recoverable, an action of covenant may be preferable, because, if the action of debt be adopted, the plaintiff cannot after seek to recover general damages. Besides, if the rent be also due, both the breaches of covenant may be included in one action, and damages for the whole be recovered. 1 Chit. Pl. 118., 6th ed.

## SECTION V.

*Action of Ejectment.*

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*In what Cases it lies. — When Action brought. — Waiver. — Must show Tenements out of Repair. — Courts of Equity will not relieve. — Applicable when Tenant holds under Agreement.*

By proceeding in an action of ejectment, the lessor will at least have the satisfaction of preventing any further injury to the premises by the lessee's breach of contract, if he cannot entirely recompense himself for the damage he has sustained.

*In what Cases it lies. —* When, by the terms of the lease, the breach of a covenant to repair incurs a forfeiture of the lease; or when the lease contains a proviso or condition for re-entry, either on non-performance of the covenants therein contained (when the lease contains a covenant to repair), or for non-repair specifically, and a breach of covenant to repair has occurred, which induces a forfeiture, it is open to the lessor or reversioner to get rid of the lessee, and recover back the premises, by proceeding in ejectment.

*When Action brought. —* The action of ejectment must be brought whilst the premises remain in a state of dilapidation.

*Waiver.* — And nothing but putting the premises in repair will prevent the landlord from his right to enter; therefore, so long as the dilapidations continue no act, of the landlord's, as the receipt of rent, &c., will amount to a waiver of the forfeiture. *Fryett d. Harris v. Jeffreys*, 1 Esp. 393.; *Doe d. Store v. Akers*, 1 R. & M. 29.; *Doe d. Boscawen v. Bliss*, 4 Taunt. 735.

When there was a general covenant to repair, and to repair within a certain time after notice, and the landlord gave notice to repair, it was no waiver of the right to enter under the general covenant to repair. *Roe d. Goatley v. Paine*, 2 Campb. 520.; but see *Doe d. Morecroft v. Meux*, 4 B. & C. 606.

If it appear that the landlord acted so as to induce the assignee of the tenant, against whom the action was brought, to believe that he was doing all that he ought, the landlord cannot recover, although the covenants be actually broken. *Doe d. Knight v. Rowe*, 2 C. & P. 246. See *West v. Blakeway*, 3 Scott, N. R. 199., 9 Dowl. 846. See also *Doe d. Sheppard v. Allen*, 3 Taunt. 78.

*Must show the Tenements out of Repair.* — In an action of ejectment for a forfeiture under a covenant to keep in tenantable repair, it is not necessary to show that the tenements were not in repair on the day of the demise; but if proved to be out of repair a short time previously, it is incumbent on the defendant to give evidence that

they had been put into repair before the right to re-enter occurred. *Doe d. Hemmings v. Durnford*, 2 C. & J. 667.

*Courts of Equity will not relieve.* — The Court of equity will not relieve a party from a forfeiture for breach of a covenant to repair, on the premises being thoroughly restored. *Waddam v. Calcraft*, 10 Ves. 67.; *Eaton v. Lyon*, 3 Id. 692.; *Mosely v. Virgin*, Id. 184.; *Hill v. Barclay*, 16 Ves. 402.; *Bracebridge v. Buckley*, 2 Price, 200. See *Rolfe v. Harris*, Id. 210. n.

When, however, there was a treaty for the sale of premises, and the proposed purchasers absolved the tenant from repairing, the Court thought, that although there was no waiver by the landlord, yet that the neglect of the tenant was, under the circumstances, so excusable, that he was entitled to relief. *Hannam v. South London Waterworks*, 2 Mer. 59 n.

*Applicable when Tenant holds under Agreement.* — The same remedy by action of ejectment may be pursued by the lessor in cases where the tenant holds under an agreement for a lease merely, but there is no actual term granted. *Doe d. Oldershaw v. Breach*, 6 Esp. 106.; *Doe d. Thompson v. Amey*, 4 P. & D. 177., 12 Ad. & E. 476.

Those who wish to pursue this subject further, will find it fully treated of in the different works of Nisi Prius, &c.

## SECTION VI.

*Action of Covenant.*

*In what Cases it lies.—Declaration.—When there are Reciprocal Covenants.—How Damages assessed.*

*In what Cases it lies.* — It has been already observed, that when a tenant has entered into a contract under seal to repair, the lessor or reversioner may maintain an action of covenant against the tenant for breach of his contract.

It has been held, that if the lessor covenant to repair during the term, if he will not do it, the lessee may repair, and pay himself by way of retainer; but *Holt* C. J. doubted of this, unless there was a covenant to deduct the expense of the repairs from the rent: and though cases occur in the books wherein it has been thought by some of the judges that the lessee might expend part of the rent in repairs of the premises if they required repair, and might set off such expenditure in an action either of debt or covenant for rent; yet such an opinion is erroneous, for the lessor and lessee have their respective remedies on the several covenants contained in the lease, and the maxim, “so to judge of contracts as to prevent a multiplicity of suits,” does not apply. *Smith v. Mapleback*, 1 T. R. 446.

*Declaration.* — The declaration should set out

the covenant verbatim, or its legal effect, and the exceptions, if any, should be stated, and the damage arising from the exception negatived. *Tempany v. Burnard*, 4 Campb. 20., *Browne v. Knill*, 2 B. & B. 395., 5 Moore, 164. S. C.

The omission of the exception would be a fatal variance. *Tempany v. Burnard*, *suprà*.

*When there are reciprocal Covenants.* — When there are reciprocal covenants, the damage sustained by one party cannot be set off in an action brought upon the covenant of the other; but the remedy of each is by action against the other. Thus, when the lessor has covenanted to repair the outside, and the lessee the inside, the remedy of the parties against each other is by cross-action on the covenant. *Leeds v. Chatham*, 1 Sim. 151.

*How Damages assessed.* — In an action on a covenant to keep premises in repair during the tenancy, the jury may take into consideration the state of the repairs at the commencement of the demise, in order to assess the damages for which the defendant is liable. *Burdett v. Withers*, 2 Nev. & P. 122., 1 Jur. 514.

In an action for non-repair, the jury may give to the landlord not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises while they are undergoing repair. *Woods v. Pope*, 6 Car. & P. 782., *Gaselee*. See on this subject *Vivian v. Champion*, 2 Ld. Raym. 1125., 1 Salk. 141.; *Colley v. Streeton*, 2 B. & C. 273., 3 D. & R. 522.

## SECTION VII.

*By Suit in Equity.*

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*When the proper Remedy.—Must be serious Injury.—  
Tenant will be restrained from making Alterations.*

*When the proper Remedy.* — BESIDES the remedies which the law affords, whereby damages may be recovered for the injury sustained in consequence of the neglect or omission of a tenant to repair the premises, there is another course which may be successfully adopted, where the injury is of such a nature as will cause irreparable mischief to the property, and this remedy is by bill in the Court of Chancery, praying an injunction. It is of a preventive nature, and may be resorted to when the injury is such as to preclude the possibility of compensation.

And though only one act of waste be proved, the injunction will go to restrain waste generally. *Coffin v. Coffin*, 6 Mad. 17.

*It must appear to be serious Injury.* — But an injunction will not be granted, unless there be an apparent intention on the part of the tenant to do some irreparable injury to the premises; and the intention may be collected from a mere threat.



Gibson v. Smith, 2 Atk. 182. In another case, sending a sawyer to mark trees was held sufficient. Jackson v. Cater, 6 Ves. 688.

*Tenant will be restrained from making Alterations.*—It would seem that the Court of equity will restrain a tenant from altering the tenements, if such alterations be disagreeable to those who have a permanent interest in them, though the alterations may improve and beautify the property. Barry v. Barry, 1 Jac. & Wal. 651. But see Molineux v. Powell, 3 P. Wms. 268. n.

But the Court will not interfere when the waste done or contemplated is trivial. Id.; Wilson v. Bragg, Bac. Abr. tit. Waste (O.).

A Court of equity will restrain a tenant from committing an act contrary to his own covenant, whether it be waste or not. Lord Grey de Wilton v. Saxon, 6 Ves. 106.; Drury v. Molins, Id. 328.; London (Mayor) v. Hedger, 18 Id. 353.

The Court of equity will grant an injunction to restrain a tenant from doing certain acts which he claims a right to do, until such right be tried in an action at law. Stonner v. Strange, Mitf. 123.; Whitelegge v. Whitelegge, 1 Bro. C. C. 57.; Sunderland v. Newton, 3 Sim. 450.

*Tenants in Common, &c.*—An injunction will not be granted to one tenant in common or joint tenant against his companion, unless it be to prevent destructive and malicious waste, or the party in possession hold the moiety of the tene-

ments as the tenant of the applicant. *Iwort v. Iwort*, 16 Ves. 128.

*Account.* — In order to avoid multiplicity of suits, the Court will sometimes grant an account, in order to compel the defendant to give compensation for the waste already committed. *Jesus College v. Bloom*, 3 Atk. 362., Amb. 54.; *Winchester (Bishop) v. Knight*, 1 P. Wms. 106.

A bill for an account of dilapidation was filed by the reversioner of a lease against the personal representative of a person whose interest in the lease appeared to be that of equitable tenant for life, with remainders over, alleging that such person in his lifetime was in possession, during which time the dilapidations occurred; that he paid rent, and was liable to the covenants in the lease; and that on his death the defendant entered into possession as his administrator, paid rent, and became liable under the covenants:—Held, that there was not a sufficient allegation of debt to support the bill. *Arkwright v. Colt*, 2 You. & C. N. C. 4.

*To whom granted.* — Any person whose interest would be prejudiced by the commission of the waste may file his bill for an injunction; a ground landlord may restrain the sub-lessee of his tenant. *Farrant v. Lovel*, 3 Atk. 723., Amb. 105. An injunction will be granted to protect the contingent interests of an executory devisee, or of a child in *ventre sa mere*. *Robinson v. Litton*, 3 Atk. 209.

## SECTION VIII.

*Other Remedies.*

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*Right of Entry to view Waste.* — BESIDES the foregoing remedies, there are other proceedings which the party may take for the purpose of preventing or repairing dilapidations, without having recourse to the courts of law or equity.

*Tenant liable to Action for Refusal.* — Thus the common law gives the lessor or reversioner the right to enter upon lands held by tenants for a particular estate, for the purpose of viewing the state of repair (see 2 Inst. 306.); and for the obstruction by the tenant of the landlord in his exercise of this right, the tenant is liable to an action on the case. *Hunt v. Dowman*, Cro. Jac. 478.

*Must give Notice.* — The reversioner should not in such case, however, take the tenant by surprise; he should give him notice of his intention to exercise his right. *Doe d. Wetherell v. Bird*, 6 Car. & P. 195.

*Cannot repair.* — But it must be recollected the landlord has no right to enter for the purpose of doing the repairs, unless he expressly stipulates to that effect; his only mode of redress is by a suit

for recovery of damages commensurate to the injury done to the premises. *Barker v. Barker*, 3 C. & P. 557.; see *Colley v. Streeton*, 2 B. & C. 273.

In the metropolitan police district, compensation for wilful damage done by tenants to the premises, or to furniture, may be awarded by a police magistrate to the extent of 15*l*. See 2 & 3 Vict. c. 71. s. 38.

When a tenancy still exists, the landlord must proceed against his tenant within one month after the commission of an offence under this act. *Dowell v. Bedingfield*, 1 Car. & Man. 9.

## SECTION IX.

*Of the Tenant's Remedies.*

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WHEN the obligation to repair is on the lessor and he neglect to do so, the tenant may quit the premises if they are uninhabitable.\* He cannot bring any action against his landlord, unless there be an express contract.

Where, however, the lessor has entered into a covenant to do certain repairs, the tenant has his remedy for the breach of this covenant by an action of covenant; and in such case the same observations will apply that have already been made under the head "Covenant."

It would seem that if the lessee do repairs for which the lessor is liable, he cannot deduct the amount of them from his rent. See *Clayton v. Kynaston*, 1 Ld. Raym. 430. per *Holt C. J.*; but see *Taylor v. Beal*, Cro. Eliz. 222. And he ought to give the lessor notice to repair. *Moore v. Clark*, 5 Taunt. 96.

\* The tenant will not be liable for rent after the occupation ceases to be beneficial. *Edwards v. Hetherington*, 7 D. & R. 117.

ADDENDUM.

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**JUDGMENT** in the following case has been given in the House of Lords since the foregoing pages went through the press ; and it will be observed that Lord Brougham casts some doubt on the cider-mill case.

The case was that of Fisher, appellant, Dixon, respondent, and was an appeal to the House of Lords, brought against a decision of the Court of Session in Scotland, in a cause in which the appellant claimed, as executor of one William Dixon, certain steam-engines, together with other apparatus and utensils, which he erected in his lifetime for the working of coal and iron mines, but which the respondent claimed as heir at law. The engines, &c. had been put up and fixed to the soil, and the question raised was, whether they were part of the realty, and passed to the heir at law, or were mere personal chattels and removable, and as such, belonged to the executors.

The Court of Session held that the property was not removable, and that it therefore passed to the heir at law ; and of this opinion was the House

of Lords, Lord Brougham observing, that there was only one case which appeared the contrary way to the decision of the Court of Session — a case in which it was represented that Lord Hardwick had decided that a cider-mill was personal estate, and the answer to that was, that, in the report of the case it was impossible to understand whether the mill was fixed to the freehold or not, or to discover what was its exact nature and character; and Lord *Cottenham*, in giving his judgment, said, that the old rule of law, which, for the benefit of trade and commerce, endeavoured to treat machinery as mere personal estate, did not apply to the present cause, because Mr. Dixon, who erected the property, was the absolute owner of the estate, and could not therefore be affected by the leaning of the law towards personalty, since it had been in his uncontrolled power to give the property, at the time, such character as he pleased. Dom. Proc. Sess. 1845.

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